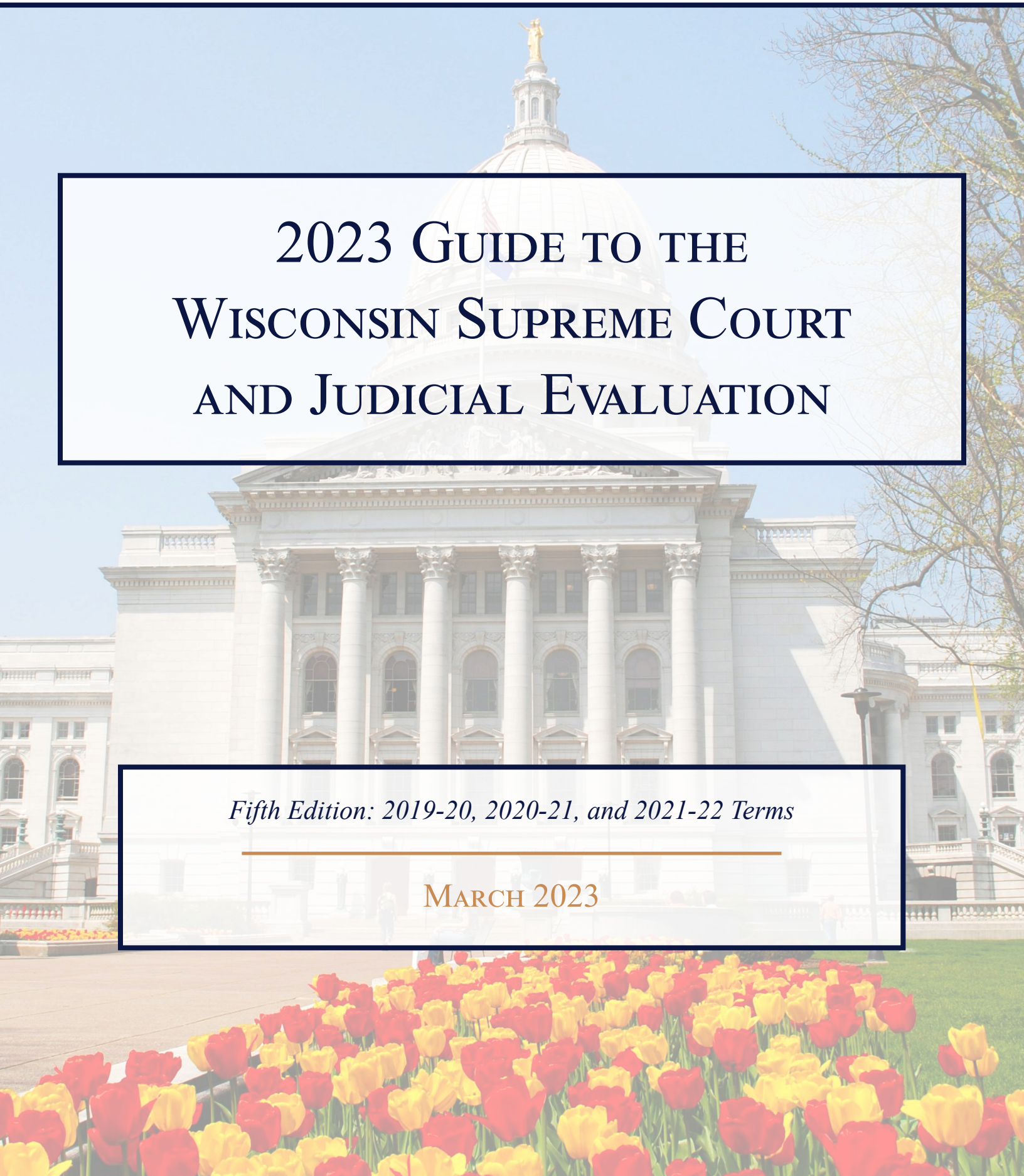
WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System



2023 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

Fifth Edition: 2019-20, 2020-21, and 2021-22 Terms

MARCH 2023

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2023 GUIDE TO THE WISCONSIN SUPREME COURT AND JUDICIAL EVALUATION

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After working together informally for decades, the Wisconsin Civil Justice Council (WCJC) was formally organized in 2009 to represent Wisconsin business interests on civil litigation issues before the Wisconsin 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 of directors is proud to present its fifth *Guide to the Wisconsin Supreme Court and Judicial Evaluation*. The purpose of this publication is to educate WCJC members, partners, and the public about the role of the courts in the state's business climate by providing a summary of the most important decisions issued by the Wisconsin Supreme Court that affect the Wisconsin business community.

WCJC Board of Directors

Executive Summary

Introduction

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 and indicates how each justice voted in the selected cases. This fifth edition covers the 2019-20, 2020-21, and 2021-22 terms of the court.

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 Wisconsin Supreme Court, consisting of seven elected 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. Each term of the court begins in September and runs through June, with opinions issued into July.

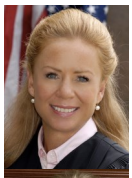
Individuals or organizations who are not actual parties to a case before the court may file an *amicus curiae* ("friend of the court") brief presenting their unique interests in the case. WCJC and its partners occasionally submit such briefs to the Wisconsin Supreme Court and, on a more limited basis, to lower courts.

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. Wisconsin Supreme Court opinions can be found on the court's website at www.wicourts.gov.

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 affect the business community, the state supreme court's decisions can equally affect businesses, negatively or positively. The Wisconsin 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 some of the court's decisions.

JUSTICES OF THE WISCONSIN SUPREME COURT



Chief Justice Annette Zielger was elected to the court in 2007 and reelected in 2017. In 2021, she was chosen by members of the court to serve as chief justice. She is up for reelection in 2027.

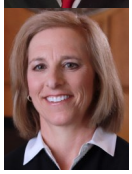
Justice Ann Walsh Bradley was elected to the court in 1995 and reelected in 2005 and 2015. She is up for reelection in 2025.

Justice Patience Roggensack was elected to the court in 2003 and reelected in 2013. She served as chief justice from 2015 to 2021. She will retire when her term ends on July 31, 2023.

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

Justice Brian Hagedorn was elected to the court in 2019 and is up for reelection in 2029.



Justice Jill Karofsky was elected to the court in 2020 and is up for reelection in 2030.

Former members included in this evaluation:

Justice Daniel Kelly was appointed to the court by Gov. Scott Walker in 2016 and lost his bid for election in 2020.

Read full biographies of current members of the court at

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

Judicial Evaluation

Each case selected for the 2023 *Judicial Evaluation* had a significant effect on one or more of the organizations comprising WCJC and the Wisconsin business community. Each decision is labeled in the following manner: "WCJC agrees with this decision" or "WCJC disagrees with this decision." This fifth edition covers the 2019-20, 2020-21, and 2021-22 terms of the Wisconsin Supreme Court.

The *Judicial Evaluation* evaluates the justices on how their decisions aligned with WCJC's positions. A justice's total score incorporates decisions on cases beginning from WCJC's formation during the 2008-09 term of the court. For more information on past cases, see the 2019, 2018, 2013, and 2011 editions of the *Judicial Evaluation*.

Wisconsin Supreme Court Scorecard

Justice	**2023 Evaluation** *Terms: 2019-20, 2020-21, 2021-22*	**2019 Evaluation** *Terms: 2018-19*	**2018 Evaluation** *Terms: 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18*	**2013 Evaluation** *Terms: 2010-11, 2011-12*	**2011 Evaluation** *Terms: 2008-09, 2009-10*	**Total Score**
Chief Justice Ziegler	86%	80%	81%	68%	100%	**81%**
Justice Walsh Bradley	57%	45%	23%	27%	43%	**33%**
Justice Roggensack	86%	76%	79%	74%	100%	**80%**
Justice R. Bradley	93%	76%	81%	n/a	n/a	**82%**
Justice Dallet	53%	59%	n/a	n/a	n/a	**56%**
Justice Hagedorn	67%	n/a	n/a	n/a	n/a	**67%**
Justice Karofsky	55%	n/a	n/a	n/a	n/a	**55%**
Former Justice Kelly	75%	76%	77%	n/a	n/a	**76%**

Discussion of Decisions 2019-20 Term

***Veritas Steel, LLC v. Lunda Construction Co.*, 2020 WI 3 (Successor Liability)**

The court declined to expand the "de facto merger" and "mere continuation" exceptions to the general rule against successor liability.

Facts

Lunda Construction Company had secured a $16 million judgment against steel fabricator PDM Bridge, LLC. PDM also owed other lenders approximately $76 million. Those lenders used a series of transactions to acquire PDM's assets, which were ultimately obtained by the entity Veritas Steel, LLC. PDM could not satisfy Lunda's $16 million judgment, and Lunda claimed successor liability against Veritas.

Decision

In a 7-0 decision (Justice Dallet, joined by Justices Walsh Bradley, R. Bradley, Hagedorn, Kelly, and Ziegler, with Chief Justice Roggensack concurring), the court held that successor liability claims must show an identity of ownership to establish the "de facto merger" and "mere continuation" exceptions to the general rule against successor liability. The court declined to expand its reading of *Fish v. Amsted Indus. Inc.*, rejecting Lunda's argument that *Fish* allows successor liability claims to demonstrate an "identity of management and control" instead of identity of actual ownership.

The court dismissed Lunda's claims, upholding the general rule against successor liability because Lunda had not demonstrated an identity of ownership between PDM and Lunda. Since Lunda had not established an actual transfer of stock or equity between PDM and Veritas, the "de facto merger" exception did not apply. Since there was no common identity of officers, directors and stockholders between PDM and Veritas, the "mere continuation" exception did not apply.

Concurring Opinion

In a concurring opinion, Chief Justice Roggensack agreed with the dismissal of Lunda's claims but would have examined the case in a different context. The concurring opinion focused on whether PDM's assets were lawfully removed from Lunda's reach by the series of transactions that ultimately ended with Veritas. The concurring opinion concluded that the assets were lawfully removed under the strict foreclosure process laid out in Wis. Stat. § 409.620. Therefore, Lunda's claims were properly dismissed.

Veritas Steel, LLC v. Lunda Construction Co. WCJC agrees with this decision.	
Justice Dallet	Wrote opinion
Justice Walsh Bradley	Concurred
Justice R. Bradley	Concurred
Justice Hagedorn	Concurred
Justice Kelly	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred

***Choinsky v. Employers Insurance Co. of Wausau*, 2020 WI 13 (Insurer Duty to Defend)**

The court held that two insurers did not breach their duty to defend when they did not immediately accept the defense of their insured. Insurers may initially deny a tendered claim, then follow a judicially preferred method of determining coverage to avoid breaching duty to defend.

Facts

A group of retired teachers filed a lawsuit against their former employer, a school district, for breach of contract following the enactment of 2011 Act 10 when the district discontinued an insurance benefit. The district tendered its defense to its insurers, Employers Insurance Company of Wausau and Wausau Business Insurance Company.

The insurers determined there was no coverage and, according to the coverage dispute procedure recommended by Wisconsin courts, moved to 1) intervene, 2) bifurcate the coverage issue from the underlying merits of the case, and 3) stay the merits of the case until the resolution of the coverage issue. The court agreed to bifurcate the issues but denied the motion to stay, citing the need for urgency in resolving the underlying employee benefits issue. The insurers agreed to meanwhile provide defense to the school district on the merits case, including retroactive fees, until the court decided the coverage issue. The school district ar-

gued the insurers breached their duty to defend by not immediately providing the school district a defense.

Decision
In a 5-1 decision (Justice R. Bradley, joined by Justices Walsh Bradley, Dallet, Chief Justice Roggensack, and Justice Ziegler), the court held that the insurers did not breach their duty to defend because, upon finding there was a coverage dispute with the insured, the insurers properly sought bifurcation of the coverage dispute and stay of the liability proceedings. Bifurcation and stay are one of four judicially preferred methods to litigate a coverage dispute between insurer and insured.

When the circuit court denied the motion to stay, the insurers properly followed another judicially preferred method by defending the insured in the liability lawsuit under a reservation of rights until the coverage dispute was resolved. Because the insurers followed the judicially preferred methods, they did not breach their duty to defend and did not owe attorney fees to the school district for the coverage dispute.

Dissent
In a dissent, Justice Kelly argued that the insurers did have a duty to defend until the coverage dispute was resolved, notwithstanding a request to bifurcate and stay. The dissent argued that the court improperly introduced a new concept of "retroactive defense" wherein an insurer can initially refuse coverage without consequence because it can always pay for the defense retroactively if a court later decides coverage is due. The "retroactive defense" concept adopted by the court allows insurers to initially breach their duty to defend and forces the insured to defend itself in coverage and liability trials simultaneously, contrary to the intent of the judicially preferred methods for coverage disputes.

Here, according to the dissent, the insurers did breach their duty to defend by not providing a defense to the school district until the coverage dispute was resolved. The insurers had a duty to defend the school district until coverage was resolved, regardless of whether the insurers sought and the circuit court approved a motion to bifurcate and stay the liability proceedings.

Choinsky v. Employers Insurance Co. of Wausau WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Chief Justice Roggensack	Concurred
Justice Ziegler	Concurred
Justice Kelly	Wrote dissent
Justice Hagedorn	*Did not participate*

***Lang v. Lions Club of Cudahy Wisconsin, Inc.*, 2020 WI 25 (Recreational Immunity)**
The court held that recreational immunity applied to a sound engineer who set up cords that injured a woman at a music performance because the sound engineer was an agent of the festival owner.

Facts
At an event run by the Lions Club of Cudahy Wisconsin, Inc., Lang tripped over an electrical cord and was injured. The cord was placed prior to the event by sound engineer Fryed Audio, LLC. Fryed was the lead member of Rhythm Method, LLC, with whom the Lions Club contracted to provide music for the event.

Lang sued several parties for her injuries, alleging negligence. A separate case ruled the Lion's Club was entitled to recreational immunity as the "owner" of the event under Wis. Stat. § 895.52(2). The question before the court was whether Fryed was also entitled to immunity as an "agent" of the Lions Club.

Decision
In a 4-3 decision (Justice Roggensack, joined by Justice Ziegler, with Justices R. Bradley and Kelly concurring), the court held that Fryed was an agent of the Lion's Club entitled to recreational immunity because the Lion's Club had the right to control Fryed's conduct in setting up the music equipment that allegedly caused Lang's injury.

The court rejected Lang's argument that the Lion's Club did not have the right to control Fryed's conduct because the Lion's Club lacked expertise to perform and control such a complicated task. The court concluded the injury-causing conduct in this case, placing the cords, was not so complicated

that the Lion's Club could not have controlled the conduct. Furthermore, placing the cords did not require the Lion's Club to provide Fryed with "reasonably precise specifications" in order for Fryed to be determined an agent. The court noted that this case differed from *Westmas v. Creekside Tree Service, Inc.*, where reasonably precise specifications would have been required for the tree-trimming service to be considered an agent of the immune owner because the injury-causing conduct was too complicated for the property owner to have control over.

Since Fryed was the subagent of Rhythm Method, which was acting as the Lion's Club's agent in setting up the music for the festival, the court determined Fryed was an agent entitled to recreational immunity.

Concurring Opinion

In a concurring opinion, Justice R. Bradley (joined by Justice Kelly) agreed that Fryed was an agent entitled to recreational immunity but disagreed with the court's reasoning related to *Westmas*. The concurring opinion would have overturned *Westmas* and simply relied on whether the Lion's Club had a right to control Fryed's actions, instead of on whether the Lion's Club had the expertise to do so. The concurring opinion argued that a principal's lack of expertise or precise specifications, as the court said in its *Westmas* analysis, does not equate to lack of control. Therefore, the court should have eliminated the "reasonably precise specifications" and expertise analysis and found Fryed an agent simply based on the Lion's Club's ability to control Fryed's actions.

Dissent

In a dissent, Justice Dallet (joined by Justice Walsh Bradley) would have determined that Fryed was not an agent of the Lion's Club and therefore Fryed was not entitled to recreational immunity. According to the dissent, the contract between the Lion's Club and Rhythm Method did not establish the Lion's Club's right to control Rhythm Method and its subagent Fryed; instead, the contract left control of setting up the music equipment up to Rhythm Method.

The dissent argued it does not matter if the task is simple or complex. Since the Lion's Club did not give "reasonably precise specifications" to Rhythm Method, *Westmas* dictates that Fryed was not an agent of the Lion's Club. The dissent also would not have provided immunity to Fryed because it was a subagent, not an agent, of the Lion's Club. The dissent argued that, under the court's decision, recreational immunity would be too broad, applying to anyone associated with the event.

In a second dissent, Justice Hagedorn would also have determined Fryed was not an agent of the Lion's Club entitled to recreational immunity. The dissent would have determined that Fryed was acting as an independent contractor of the Lion's Club, not in a master-servant relationship where the agent's physical conduct is controlled by the principal. As an independent contractor, Fryed was not acting within the scope of agency when it allegedly negligently placed the cords causing injury. The Lion's Club did not have the right to control how Fryed set up the music equipment. Therefore, the dissent concluded Fryed was not an agent entitled to recreational immunity.

Lang v. Lions Club of Cudahy Wisconsin, Inc. WCJC agrees with this decision.	
Chief Justice Roggensack	Wrote opinion
Justice R. Bradley	Concurred
Justice Kelly	Concurred
Justice Ziegler	Concurred
Justice Dallet	Wrote dissent
Justice Hagedorn	Wrote dissent
Justice Walsh Bradley	Dissented

***Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46 (Insurance Malpractice)**

The court held that plaintiffs claiming negligent procurement by an insurance agent must establish that the desired policy was both commercially available and that the insured would have qualified for it.

Facts

After Emer's Camper Corral, LLC, a business that sells campers, had twice previously filed claims under previous insurers for approximately $100,000 in hail damage, its insurance agent Alderman procured an insurance policy through Western Heritage Insurance Company for Camper Corral to insure its inventory. The Western Heritage policy had a hail damage deductible of $5,000 per unit. According to Camper Corral, the following year Alderman told Camper Corral he obtained

a reduced deductible of $1,000 per unit with a $5,000 total deductible cap. However, when Camper Corral filed a claim for another hailstorm under the policy, the policy language actually retained the original $5,000 per unit.

Camper Corral filed a negligence action, seeking damages for the amounts the company was required to pay above the $5,000 total deductible cap it believed the policy included. Alderman argued that there was no evidence Camper Corral could otherwise have obtained a policy with the desired $1,000 per unit, $5,000 total deductible cap.

Decision
In a 6-1 decision (Justice Kelly, joined by Justices Walsh Bradley, R. Bradley, Dallet, Hagedorn, and Ziegler), the court found that the commercial availability of Camper Corral's desired policy was not sufficient to establish that Alderman's negligence caused Camper Corral's injury. Plaintiffs like Camper Corral claiming negligent procurement must also establish that the individual plaintiff would have been able to obtain the desired policy terms. The court stated that plaintiffs themselves bear the burden to prove they could have been insurable under the desired policy terms. In this case, Camper Corral did not produce evidence to prove it could have obtained the desired hail damage policy, so Alderman did not cause Camper Corral's damage, and the negligence claim failed.

Camper Corral raised an alternative argument under the "reliance theory" that Alderman's negligence caused injury to Camper Corral because Camper Corral would have altered its behavior to minimize risk if it had known it was not covered by the desired policy terms. The court said plaintiffs can prove causation of injury using the reliance theory, but in this case Camper Corral failed to provide credible evidence that it would have changed its behaviors.

Dissent
In a dissent, Chief Justice Roggensack argued that proving general commercial availability should be sufficient to establish causation in negligent procurement cases. According to the dissent, the court's new standard for proving causation of injury in negligent procurement cases by establishing insurability is too burdensome on the consumer. The dissent would also have found that in this case Camper Corral proved both that the desired policy was commercially available and the company could have been eligible for it.

Emer's Camper Corral, LLC v. Alderman WCJC agrees with this decision.	
Justice Kelly	Wrote opinion
Justice Walsh Bradley	Concurred
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Justice Ziegler	Concurred
Chief Justice Roggensack	Wrote dissent

Discussion of Decisions 2020-21 Term

***Mohns Inc. v. BMO Harris Bank N.A.*, 2021 WI 8 (Discovery Violations)**

The court held that the circuit court was within its discretion to impose judgement on liability, including for intentional misrepresentation, as a sanction for discovery violations, but also overturned excessive damages awarded by the circuit court.

Facts

Mohns Inc. was the general contractor for a condominium construction venture developed by Bouraxis and financed by BMO Harris Bank. Several years later, BMO sold the construction loan to MIL Acquisition Venture. A few months after the sale, Mohns ceased work on the project because it was no longer receiving payments from the loan for its work. Nearly two years later, MIL filed a foreclosure action against the developer Bouraxis, naming Mohns as a third party because of the company's liens on the property. Mohns counterclaimed against MIL seeking to recover payment for its unpaid work. After Mohns' claim against MIL was dismissed, Mohns sued BMO, alleging breach of contract, unjust enrichment, and misrepresentation regarding the availability of funds to pay Mohns for its work on the project.

Following months of proceedings, including discovery and depositions, the court found that BMO had disregarded its obligations under court orders to produce representatives and documents. The court granted summary judgment in favor of Mohns as a sanction for BMO's discovery violations, citing Wis. Stat. § 804.12. The court also ordered a jury trial to determine damages for the discovery violations, after which Mohns was awarded compensatory damages for breach of contract and unjust enrichment as well as punitive damages. The court denied BMO's motions challenging the damages, reduced the punitive damages awarded by the jury, and added attorney's fees as an additional sanction against BMO. The appellate court ultimately affirmed the circuit court's judgement in favor of Mohns. BMO appealed.

In its appeal to the Wisconsin Supreme Court, BMO argued that the appellate court should have reversed the sanction imposing judgement on liability because the circuit court didn't consider that Mohns may have been prejudiced by BMO's conduct; should have set aside the award of damages for unjust enrichment because it was mutually exclusive with damages awarded for breach of contract; and should have overturned the punitive damages award because it was tied to contract claims.

Decision

In a 5-0 decision (Justice R. Bradley, joined by Justices Walsh Bradley, Dallet, Karofsky, and Chief Justice Roggensack), the court held that the circuit court was within its discretion to sanction BMO for discovery violations by imposing judgement on liability under Wis. Stat. § 804.12. However, the court ruled that "because the law does not permit recovery of damages for both breach of contract and unjust enrichment arising from the same conduct, the award of damages for unjust enrichment must be set aside." The court also found that "the punitive damages award must be overturned because it was based upon an award of damages for the contract claims, and punitive damages are recoverable only in tort." Accordingly, the court affirmed the appellate court as to the discovery sanction and reversed with respect to the damages.

Mohns Inc. v. BMO Harris Bank N.A. WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Karofsky	Concurred
Chief Justice Roggensack	Concurred
Justice Hagedorn	*Did not participate*
Justice Ziegler	*Did not participate*

***Stroede v. Society Insurance*, 2021 WI 43 (Trespasser Immunity)**

The court held that a patron of a bar was not immune from liability for a trespasser's injuries.

Facts

While drinking at a bar, Stroede became intoxicated and punched another patron. He was ordered to

leave by a bartender and was escorted out of the bar. Stroede returned to the bar several minutes later. Tetting, who was employed by the bar and was patronizing it with his family at the time, grabbed Stroede by the shoulders and walked him back to the entrance of the bar. When Tetting released Stroede, Stroede fell down a set of stairs at the entrance and suffered injuries.

Stroede sued Tetting, the bar, and their insurers, alleging that Tetting used excessive force and was negligent in the way he released Stroede at the entrance to the bar. The circuit court concluded Stroede was a trespasser at the time he was injured, and therefore, the bar could not be held liable per Wis. Stat. § 895.529, which provides that a "possessor of real property" owes no duty of care to a trespasser unless the possessor acts "willfully, wantonly, or recklessly."

After briefing and oral argument on Stroede's claims against Tetting and his insurer, the circuit court found that trespasser immunity did not apply to Tetting because he did not meet the definition of a "possessor of real property" with respect to the premises of the bar. Wis. Stat. § 895.529(1)(a) defines a "possessor of real property" as "an owner, lessee, tenant, or other lawful occupant of real property." The court of appeals reversed, finding that Tetting was an "other lawful occupant" of the bar under the plain meaning of that phrase, and thus protected from liability for Stroede's injuries.

Decision
In a 4-1 decision (Justice Karofsky, joined by Justices Dallet, Hagedorn, and Chief Justice Ziegler), the court held that Tetting was not an "other lawful occupant" of the bar under the definition of a "possessor of real property" and thus not entitled to immunity from the trespasser's claims. The court first noted that while common dictionary definitions of "occupant" might include Tetting, *Black's Law Dictionary* defines "occupant" as "someone who has possessory rights in, or control over, certain property or premises."

The court concluded that, as a matter of statutory construction, the general phrase "other lawful occupant" should be limited and interpreted based on the specific terms preceding it: "an owner, lessee, tenant… of real property," meaning a person with "some degree of possession or control over the property and the ability to give and withdraw consent to enter or remain on the property." Because Tetting, as a patron of the bar at the time of event, had no possession of or control over the premises, he was not protected from Stroede's claims.

Dissent
In a dissent, Justice R. Bradley argued that the court's decision disregarded the plain meaning of "other lawful occupant of real property," which the dissent interpreted to mean "an individual who is lawfully present on the premises." According to the dissent, the court erred in interpreting the first clause of the definition of a "possessor of real property" ("owner, lessee, tenant") as somehow modifying or limiting the second ("other lawful occupant"): "None of the majority's limiting language appears in the text of the statute and this strained interpretation of the phrase is belied by its plain meaning. 'Lawful occupant of real property' means precisely what it says: an individual who lawfully occupies the property."

Stroede v. Society Insurance WCJC disagrees with this decision.	
Justice Karofsky	Wrote opinion
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Chief Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Walsh Bradley	*Did not participate*
Justice Roggensack	*Did not participate*

Graef v. Continental Indemnity Co., 2021 WI 45
(Worker's Compensation)
The court held that an employee's negligence claim was barred by the exclusive-remedy provision of the Wisconsin Worker's Compensation Act.

Facts
Graef was gored by a bull while working in the livestock yard at Equity Livestock. Because of physical injuries and depression resulting from the incident, Graef attempted suicide with a firearm and suffered a gunshot injury. A doctor had prescribed an antidepressant for Graef's depression; the livestock company's worker's compensation insurer, Continental Indemnity Company, bore responsibility for authorizing and paying for the medication. Shortly before Graef attempted suicide, Continental denied a payment request for a refill of his antidepressant prescription.

Two years later, Graef filed a tort action alleging that Continental was negligent in its refusal to authorize and pay for refilling his prescription, seeking compensatory damages associated with his suicide attempt. Continental moved for summary judgement, asserting that the Wisconsin Worker's Compensation Act provided the exclusive remedy for Graef's claims. The circuit court denied Continental's motion, concluding that the exclusive-remedy provision did not bar Graef's tort action. The appellate court reversed and Graef appealed.

Decision
In a 6-1 decision (Justice Karofsky, joined by Justices Walsh Bradley, Dallet, Hagedorn, Roggensack, and Chief Justice Ziegler), the court agreed with the court of appeals and Continental, concluding that Graef's allegations, if true, "satisfy the conditions of liability under Wis. Stat. § 102.03(1), and therefore his claim must be filed as a worker's compensation claim." The court affirmed the appellate court's decision and remanded the matter to the circuit court with instructions to grant summary judgement to Continental on Graef's negligence claim.

Dissent
In a dissent, Justice R. Bradley argued that the court erred in its application of the exclusive-remedy provision at Wis Stat. § 102.03(2): "Although an employee has the *right* to recover under the Act where the statutory conditions for worker's compensation exist, in the absence of such a right to recover, the Act presents no impediment to claims based on other theories of law." The dissent argued that the court erred in prematurely foreclosing Graef from pursuing an alternative theory of liability.

In fact, the dissent argued, "because Continental refused to concede that Graef would recover under worker's compensation law, the Act could not constitute the exclusive remedy. … At this stage of the litigation, it remains uncertain whether Graef is entitled to any recovery under" the Wisconsin Worker's Compensation Act. "Accordingly," per the dissent, "Graef's tort claim should survive unless and until his right to recovery under the Act is established."

Graef v. Continental Indemnity Co. WCJC agrees with this decision.	
Justice Karofsky	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Justice Roggensack	Concurred
Chief Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent

***Kemper Independence Insurance Co. v. Islami*, 2021 WI 53 (Homeowners Insurance)**
The court upheld an insurer's denial of coverage based on the actions of a claimant's estranged spouse.

Facts
Ydbi Islami set fire to the home occupied by his estranged wife, Ismet Islami. The two had been legally separated since 1998; Ismet received sole ownership of the home as part of the separation. Ydbi deceived the home's insurer, Kemper Independence Insurance Company, by concealing facts about his involvement in the fire. Kemper denied coverage to Ismet for the loss of her home, reasoning that the "concealment or fraud" condition in its insurance policy barred coverage for Ismet's claims because of Ydbi's conduct. The circuit court granted summary judgement in favor of the insurer and the appellate court affirmed.

Ismet appealed, arguing that Ydbi was not her spouse and therefore not an insured due to their legal separation, so the policy's exclusion for "concealment or fraud" on the part of an insured could not be applied. Ismet also asserted that she was an innocent insured and a victim of domestic abuse and as such, under Wis. Stat. § 631.95(2)(f), the policy's "intentional acts" exclusion did not apply to her claim.

Decision
In a 4-3 decision (Justice R. Bradley, joined by Justices Hagedorn, Roggensack, and Chief Justice Ziegler), the court held the following: "(1) Ydbi is an insured under the terms of the Policy, both under the plain language of the insurance contract and because Wisconsin's marriage laws recognize Ydbi as Ismet's spouse; (2) the Policy's 'concealment or fraud' condition precludes coverage for Ismet–a conclusion unaffected by the Policy's 'intentional loss' exclusion; and (3) Wis. Stat.

§ 631.95(2)(f) does not apply because the record lacks any evidence showing Ydbi's arson constituted 'domestic abuse' against Ismet, as statutorily defined."

Dissent
In a dissent, Justice Karofsky (joined by Justices Walsh Bradley and Dallet) argued that the court misread the statutory language of Wis. Stat. § 968.075(1)(a)4., which defines "domestic abuse" under state law, and then improperly applied the definition in the context of Wis. Stat. § 631.95(2)(f), which prohibits insurers from denying a property insurance claim to an innocent insured when the property loss or damage results from domestic abuse. The dissent argued that the court's analysis for determining whether the arson constituted domestic abuse was too stringent when compared with the plain meaning of the statute defining domestic abuse.

Kemper Independence Insurance Co. v. Islami WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Hagedorn	Concurred
Justice Roggensack	Concurred
Chief Justice Ziegler	Concurred
Justice Karofsky	Wrote dissent
Justice Walsh Bradley	Dissented
Justice Dallet	Dissented

***Clean Wisconsin, Inc. v. DNR*, 2021 WI 72**
(Statutory Construction)
The court held that the Department of Natural Resources had the authority to conduct an environmental review of any application for a high-capacity well permit, even though state law only specifically authorized the department to review certain types of wells. Wis. Stat. § 227.10(2m) prohibits the state from implementing or enforcing a standard or requirement unless "explicitly required or explicitly permitted by statute or by [administrative] rule." The court reasoned that the department had "explicit" authority to review any high-capacity well application under several broad policy statements and vague constitutional provisions. The same reasoning, if applied to other cases, could undermine or limit many important tort reforms in areas such as product liability, caps on damages, and the standard of proof for claimants.

Facts
The Wisconsin Department of Natural Resources (DNR) is responsible for reviewing permit applications for high-capacity groundwater wells. Wis. Stat. § 281.34, in pertinent part, directs DNR to conduct an environmental review and to deny or impose additional conditions on applications for certain specified categories of high-capacity wells. The law does not specifically require or authorize DNR to conduct an environmental review or impose permit conditions on high-capacity wells in general.

In *Lake Beulah Management District v. DNR*, the court held that under broad and general statements in the Wisconsin Constitution and Wis. Stat. Ch. 281, "DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state," even though the law did not specifically authorize it for the type of well at issue. The court went further, holding "that to comply with this general duty, the DNR must consider the environmental impact of a proposed high capacity well … or in some cases deny a permit application or include conditions in a well permit."

While *Lake Beulah* was pending before the court, the legislature enacted Wis. Stat. § 227.10(2m), which prohibits the state from implementing or enforcing a standard or requirement unless "explicitly required or explicitly permitted" by statute or administrative rule. The attorney general later issued an opinion stating that Wis. Stat. § 227.10(2m) negated the court's holding in *Lake Beulah*.

After initially putting eight high-capacity well applications on hold for environmental review, DNR subsequently approved them, concluding that it did not have the authority to deny or impose additional conditions on the permits. Clean Wisconsin, Inc. and Pleasant Lake Management District sued DNR, arguing that under *Lake Beulah*, the department had both the authority and a duty to consider the environmental impact of all high-capacity wells. In response, DNR referenced the attorney general's opinion that Wis. Stat. § 227.10(2m) negated *Lake Beulah*. The department also argued that *Lake Beulah* was incorrectly decided because it was based on an "implied" authority for the department rather than the explicit text of the statutes.

The circuit court held that *Lake Beulah* remained in effect, vacating seven of the well applications and remanding one to DNR to consider the well's potential effect on a nearby creek. While the case was on appeal to the supreme court, the legislature and several business associations filed to intervene on behalf of DNR's original position, and the department itself switched positions to join Clean Wisconsin.

Decision

In a 4-2 decision (Justice Dallet, joined by Justices Walsh Bradley, Karofsky, and Chief Justice Ziegler), the court held that Wis. Stat. § 227.10(2m) did not negate *Lake Beulah*. Interpreting Wis. Stat. § 227.10(2m), the court argued that "explicit authority and broad authority are different concepts but not mutually exclusive ones." Therefore, according to the court, "DNR's authority to consider the environmental effects of proposed high capacity wells, while broad, is nevertheless explicitly permitted by statute." The court remanded the eight well applications to DNR to "use its discretion and expertise to determine whether to approve the wells."

Dissent

In a dissent, Justice R. Bradley (joined by Justice Roggensack) argued that "a faithful reading of Wis. Stat. § 227.10(2m) leads to the inescapable conclusion that the legislature abrogated *Lake Beulah* and curtailed the broad grants of authority previously delegated to agencies … DNR has no explicit authority to conduct an environmental impact review for any of the eight high capacity wells at issue in this case because the legislature has not explicitly required or permitted such reviews." The dissent expressed a concern with the implications of the court's decision: "Extending beyond the parties to this case, the majority's decision undermines the sovereignty of the people and disturbs the equilibrium of governmental power to the detriment of the governed."

Clean Wisconsin, Inc. v. DNR WCJC disagrees with this decision.	
Justice Dallet	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Karofsky	Concurred
Chief Justice Ziegler	Concurred
Justice R. Bradley	Wrote dissent
Justice Roggensack	Dissented
Justice Hagedorn	*Did not participate*

Discussion of Decisions 2021-22 Term

Townsend v. ChartSwap, LLC, 2021 WI 86

(Health Care Record Fees)

The court held that a health care records management firm was not subject to the fee restrictions that apply to health care providers.

Facts

Townsend was injured in a car crash and retained a law firm for her personal injuries. The firm sought certified health care records and billings from a health care provider involved in Townsend's care. ChartSwap, a records management firm working on behalf of the health care provider, fulfilled the request and billed the law firm for $35.87, which the law firm paid. Townsend filed a class action lawsuit against ChartSwap for violating Wis. Stat. § 146.83(3f)(b), which limits the fees that a health care provider may charge to produce copies of health care records.

Decision

In a 7-0 decision (Justice Roggensack, joined by Justices R. Bradley, Hagedorn, and Chief Justice Ziegler, with Justices Walsh Bradley, Dallet, and Karofsky concurring), the court held that "under a plain meaning interpretation of Wis. Stat. § 146.81 (1), ChartSwap is not a health care provider; and, therefore, it is not subject to the fee restrictions in Wis. Stat. § 146.83(3f)(b), which regulate health care providers." The court also rejected the argument that legal principles of agency applied to ChartSwap, noting that an agent is subject to "liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent [itself] owes to the third party."

Concurring Opinion

In a concurring opinion, Justice Dallet (joined by Justices Walsh Bradley and Karofsky) declined to join part of the court's analysis as to whether ChartSwap met the definition of a "health care provider" under Wis. Stat. § 146.81(1). The concurring opinion agreed with the court's finding that ChartSwap was not a health care provider under the plain meaning of the statute, but argued that the court's analysis should have ended there. The concurring opinion argued that the court misapplied a canon of statutory construction in its extended discussion of the issue.

Townsend v. ChartSwap, LLC WCJC agrees with this decision.	
Justice Roggensack	Wrote opinion
Justice Walsh Bradley	Concurred
Justice R. Bradley	Concurred
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Justice Karofsky	Concurred
Chief Justice Ziegler	Concurred

Brey v. State Farm Mutual Automobile Insurance Co., 2022 WI 7 (UIM Coverage)

The court held that state law permits an automobile insurer to require that an insured sustain bodily injury to trigger underinsured motorist (UIM) coverage.

Facts

Brey, a minor child, was covered by an automobile liability insurance policy issued by State Farm to Brey's mother and her husband for their automobile. Brey's father died in a motor vehicle accident as the passenger in another vehicle driven by another person. Brey's father, the driver, and the vehicle were not insured under the State Farm policy.

Brey intervened in an action brought by his father's parents against the driver, the owner of the vehicle, and their insurance companies, adding his mother's automobile insurer State Farm as a defendant. Brey sought to recover damages as an insured under the State Farm policy's UIM provision.

State Farm sought summary judgement on the basis that Brey's father was not an "insured" under the policy, and that none of the people insured under the policy sustained bodily injury in the accident that killed Brey's father. Brey argued that the policy's requirement that an insured sustain injury to trigger UIM coverage was contrary to Wis. Stat. § 632.32(2)(d) and therefore void and unenforceable (Wis. Stat. § 632.32, sometimes referred to as the "Omnibus Statute," sets the minimum requirements for all motor vehicle insurance policies in Wisconsin).

Decision
In a 7-0 decision (Justice R. Bradley), the court held that the State Farm policy "affords UIM coverage to only an insured who sustained bodily injury caused by an accident involving an underinsured motor vehicle." Because Brey's father was not insured under the policy and Brey was not involved or injured in the accident that killed his father, he was not entitled to UIM coverage under the policy. The court found that "Wisconsin Stat. § 632.32(2)(d) plainly does not preclude an insurer from limiting UIM coverage to insureds who sustain bodily injury or death." Accordingly, the court found that the circuit court property granted State Farm's motion for summary judgement and the court of appeals erred in reversing it.

Brey v. State Farm Mutual Automobile Insurance Co. WCJC agrees with this decision.	
Justice R. Bradley	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Justice Karofsky	Concurred
Justice Roggensack	Concurred
Chief Justice Ziegler	Concurred

***Cree, Inc. v. LIRC*, 2022 WI 15 (Employment Discrimination)**
The court held that an employer lawfully rescinded a job offer based on the applicant's conviction record.

Facts
Palmer plead no contest to eight counts of domestic violence against a former girlfriend and was sentenced to 30 months in prison. While incarcerated, Palmer earned a mechanical design certification through the Wisconsin Department of Corrections education program. This new qualification led him to apply for a job at Cree, Inc., which offered the position to Palmer, contingent on the results of a background check. After Cree conducted a background check on Palmer, the company's general counsel used a hiring decision matrix to evaluate Palmer's convictions and decided as a result to rescind the offer of employment.

Palmer filed a complaint with the Department of Workforce Development, alleging that Cree discriminated against him based on his conviction record and in violation of the Wisconsin Fair Employment Act. An administrative law judge ruled that Cree was within its right to revoke the job offer under Wis. Stat. § 111.335(a)1., which prohibits discrimination in hiring based on conviction record unless the circumstances of an applicant's conviction "substantially relate" to the circumstances of the job offered.

The case turned largely on testimony from a domestic violence expert, introduced by Cree, arguing that domestic violence indicates a general propensity to use violence to assert power in interpersonal relationships that could extend to the workplace. The ALJ and the circuit court ruled in Cree's favor, finding that the expert testimony provided evidence to support the company's decision. The Labor and Industry Review Commission and the court of appeals ruled in Palmer's favor, relying primarily on the domestic nature of Palmer's convictions in finding that they did not substantially relate to the nature of the job at Cree.

Decision
In a 4-3 decision (Justice Karofsky, joined by Justices R. Bradley, Roggensack, and Chief Justice Ziegler), the court held that Cree did not unlawfully discriminate against Palmer because his convictions demonstrated a "willingness to use violence to exert power and control over others" that "substantially relates to the independent and interpersonal nature" of the job offered to him by Cree. The court noted that the job was likely to involve situations where Palmer's power or authority might have been threatened, such as responding to the complaints, problems, and demands of customers, coworkers, and supervisors.

The court also noted that the job offered to Palmer was relatively independent and unsupervised, involved travel to customer facilities and trade shows, and allowed access to most of Cree's 600,000 square foot manufacturing facility, including many unmonitored areas. These circumstances, combined with the serious and recent nature of Palmer's offenses, were enough for the court to find that Cree "met its burden to establish a substantial relationship between the circumstances of Palmer's convicted offenses and the circumstances of the [position]."

Dissent
In a dissent, Justice Dallet (joined by Justices Walsh Bradley and Hagedorn) argued that the court ignored the "context-specific directive" of Wis. Stat. § 111.335(3)(a)1., "focusing instead on generic 'character traits,' as well as the general qualities of the workplace, gutting the anti-discrimination policy of the Fair Employment Act in the process." The dissent would have found that Cree failed to meet its burden to show a link between the convictions and the job, pointing in part to fact that the crimes occurred in a domestic context with an intimate partner, not in the workplace or involving a coworker. The dissent also argued that the court employed the wrong standard of review in its decision and should have disregarded the testimony of Cree's expert on domestic violence.

Cree, Inc. v. LIRC WCJC agrees with this decision.	
Justice Karofsky	Wrote opinion
Justice R. Bradley	Concurred
Justice Roggensack	Concurred
Chief Justice Ziegler	Concurred
Justice Dallet	Wrote dissent
Justice Walsh Bradley	Dissented
Justice Hagedorn	Dissented

***Colectivo Coffee Roasters, Inc. v. Society Insurance*, 2022 WI 36 (Property Insurance)**
The court held that losses sustained by several bars and restaurants as a result of COVID-19 and related government restrictions were not covered by their property insurance policies.

Facts
The emergence of the COVID-19 virus and related government restrictions on in-person dining caused Colectivo Coffee Roasters and many other bars and restaurants to experience substantial losses of business income by moving to a takeout-only business model or closing entirely. Colectivo filed a claim with Society Insurance, its commercial property insurer, seeking to recover lost income. Society denied the claim on the grounds that Colectivo had not suffered a "direct physical loss" of property, as required by the policy.

Colectivo, on behalf of several other businesses, filed a class-action complaint against Society, alleging that the "presence of any COVID-19 particles renders items of physical property unsafe," thereby causing "direct physical harm, direct physical damage, and direct physical loss to property" and requiring Society to compensate Colectivo for harm to its property and the resulting lost business income, plus damages for breach of contract. Colectivo also argued that government orders related to COVID-19 "prohibited the public from accessing [its] restaurants, thereby causing the necessary suspension of [its] operations" and triggering the business-income, extra-expense, and civil-authority provisions of the policy.

Decision
In a 7-0 decision (Justice Dallet), the court held that the insurance policy's business-income, extra-expense, and civil-authority provisions were all foreclosed because they required the insured to experience "a physical loss of or damage to either Colectivo's property or a surrounding property." Referring to case law interpreting similar insurance policies, the court found that "for a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt, or replaced–that is, it must alter the property's tangible characteristics." Neither the presence of COVID-19 nor government orders closing restaurants did any tangible harm to Colectivo's physical property.

The court also addressed Colectivo's claim that its losses were covered under the policy's contamination provision, which covers losses due to a contamination of the policyholder's products, merchandise, or premises that "results in an action by a public health or governmental authority that prohibits access to the [property] or production of [Colectivo's] product." The court found that government orders related to COVID-19 "did not prohibit access to Colectivo's property; they restricted how the property could be used," and "did not prohibit Colectivo from producing its products; they prevented it only from serving its products for in-person dining."

Colectivo Coffee Roasters, Inc. v. Society Insurance WCJC agrees with this decision.	
Justice Dallet	Wrote opinion
Justice Walsh Bradley	Concurred
Justice R. Bradley	Concurred
Justice Hagedorn	Concurred
Justice Karofsky	Concurred
Justice Roggensack	Concurred
Chief Justice Ziegler	Concurred

***Murphy v. Columbus McKinnon Corp.*, 2022 WI 109 (Product Liability)**

The court held that a defendant manufacturer was not entitled to summary judgement on a plaintiff's strict liability and negligence claims for defective design of a product, establishing its first-ever interpretation of Wisconsin's product liability statute.

Facts

While working as a utility line technician, Murphy was injured when a utility pole fell on him. Murphy was operating a truck-mounted boom and winch fitted with tongs to lift poles onto a trailer, which he was trained to do and had done many times before in his six years as a line technician. Murphy's injury occurred when, upon hoisting a pole into the air, it came loose from the tongs and struck him.

The tongs Murphy used to lift the pole were "Dixie" tongs manufactured by Columbus McKinnon Corporation (CMC). Murphy brought a product liability lawsuit against CMC, alleging strict liability for defective design under Wis. Stat. § 895.047(1). Murphy claimed that the design of CMC's tongs was unreasonably dangerous and that a safer alternative design, called "Hogg-Davis" or "jaw" tongs, was available and could have been used for the same purpose. Murphy also brought a common law claim of negligent design on the same basis.

Following several years of discovery and other proceedings, CMC moved for summary judgement on all claims, which the circuit court twice denied and then granted. The court of appeals reversed in part, finding genuine disputes of material fact with respect to Murphy's alternative design theory and CMC's fact-specific defenses. Murphy had also alleged strict product liability on the theory of failure to warn as well as a second alternative design theory based on "choker" tongs, but the failure to warn claim was withdrawn after Murphy settled with other defendants, and Murphy did not appeal his second alternative design theory after CMC won summary judgement.

Decision

In a 4-3 decision (Justice Roggensack, with Justices Walsh Bradley, Dallet, and Karofsky concurring), the court held that the circuit court erred in awarding summary judgement to CMC on Murphy's strict product liability and negligent design claims. The court found that both claims presented genuine issues of material fact to be resolved by a jury. This case was the court's first-ever interpretation of Wis. Stat. § 895.047, which was created by 2011 Act 2 and established the state's first product liability statute.

Wis. Stat. § 895.047(1) provides five factors that a claimant must establish for a strict product liability claim to succeed; at issue in this case were the two factors described in paragraphs (a) and (b). According to the court, Wis. Stat. § 895.047(1)(a) requires "proof of a more safe, reasonable alternative design the omission of which renders the product not reasonably safe." This "risk-utility" or "reasonable alternative design" test first appeared in the Restatement (Third) of Torts § 2, which the court declined to adopt in prior product liability cases.

The court noted that although paragraph (a) "appears to borrow language from the [Third Restatement], the legislature did not adopt the entirety of § 2, nor did it enact the Restatement's voluminous comments." The court specifically declined to adopt comment f from the Third Restatement, which the court of appeals relied upon in its decision.

Under the second factor for establishing strict product liability, Wis. Stat. § 895.047(1)(b), a claimant must prove "that the defective condition rendered the product unreasonably dangerous to persons or property." The court held that the plain language of this provision "is clear in showing that the legislature codified the common law consumer-contemplation" or "unreasonably dangerous" test. The court adopted this standard in 1975 from the Restatement (Second) of Torts as the means for determining whether a product is "unreasonably dangerous."

The court agreed with the court of appeals that summary judgement on Murphy's claims was not appropriate. However, the court rejected "the court of appeals' conclusion" and CMC's contention "that the legislature discarded the consumer-contemplation test by incorporating the risk-utility balancing test." Instead, the court found that the legislature deliberately chose to create a "hybrid" test for determining product liability under Wis. Stat. § 895.047(1) by adding the risk-utility test in paragraph (a), codifying the common law consumer-contemplation test in paragraph (b), and otherwise codifying the common law on product liability developed by Wisconsin courts in paragraphs (c), (d), and (e).

As to Murphy's negligence claim, the court noted that under Wis. Stat. § 895.047(6), the product liability statute "does not apply to actions based on a claim of negligence or breach of warranty," rejecting CMC's argument that the legislature eliminated common law claims for product liability when it adopted Act 2.

Concurring Opinion
In a concurring opinion, Justice Karofsky (joined by Justices Walsh Bradley and Dallet) agreed with the court's decision except for two paragraphs in the lead opinion, one dealing with the legislature's intent in adopting Act 2 and another stating that "the common law pre-2011 continues to provide persuasive authority in products liability cases." The concurring opinion elaborated on the court's analysis of "the relationship between Wis. Stat. § 895.047 and the common law, as well as the application of that law to the facts of this case."

Partial Dissent
In a partial dissent, Justice Hagedorn (joined by Justice R. Bradley and Chief Justice Ziegler) agreed with the court that Murphy's negligence claim could proceed, but would have upheld the circuit court's award of summary judgement to CMC on Murphy's strict liability claim. According to the dissent, Murphy "failed to present any evidence establishing that the Dixie tongs were unreasonably dangerous under Wis. Stat. § 895.047(1)(b)," and therefore his claim did not meet the requirements to establish strict product liability.

Murphy v. Columbus McKinnon Corp. WCJC disagrees with this decision.	
Justice Roggensack	Wrote opinion
Justice Walsh Bradley	Concurred
Justice Dallet	Concurred
Justice Karofsky	Concurred
Justice Hagedorn	Wrote partial dissent
Justice R. Bradley	Partially dissented
Chief Justice Ziegler	Partially dissented

***Dostal v. Strand*, 2023 WI 6 (Wrongful Death)**
The court held that a person's conviction for second-degree reckless homicide did not establish that his actions were not an "accident" under his insurance policy.

Facts
Dostal gave birth in 2017 to a daughter fathered by Strand. Their daughter died several months later due to head trauma while in Strand's care. Strand was ultimately convicted of second-degree reckless homicide in the death of their daughter. Dostal sued Strand for negligence and wrongful death. Strand tendered the matter to State Farm under his homeowners insurance policy. The circuit court granted State Farm's motion to stay the liability proceedings and review the issue of coverage.

State Farm argued that its policy did not provide coverage for Dostal's claims against Strand because the event of their daughter's death was not an "occurrence" (defined as an "accident") under the policy. State Farm argued that Strand's conviction for second-degree reckless homicide precluded characterizing the event as an "accident" or "occurrence." Further, State Farm argued that coverage was precluded under "resident relative" and "intentional acts" exclusions.

The circuit court agreed with State Farm and granted its motion for summary and declaratory judgement, finding that the death was not an "occurrence" under the policy and that the "intentional acts" exclusion also applied but not the "resident relative" exclusion. Dostal appealed the decision, and State Farm appealed the circuit court's finding on the resident relative exclusion. The court of appeals affirmed the circuit court's decision, agreeing that there was no "occurrence" under the policy and declining to rule on the exclusions.

Decision
In a 4-3 decision (Justice Walsh Bradley, joined by Justices Dallet, Hagedorn, and Karofsky), the court held that insurance coverage of Dostal's claims was not precluded by Strand's reckless homicide conviction. The court found that the conviction only established that Strand's conduct disregarded the substantial risk of harm to his daughter but did not establish that he expected or intended to cause her death. Therefore, the conviction did not establish as a matter of legal fact that the death was not an "accident" or "occurrence" under State Farm's policy.

Furthermore, the court found "that there are genuine issues of material fact regarding the application of the resident relative and intentional acts exclusions such that summary judgment is inappropriate." Accordingly, the court held that Dostal could continue to pursue her claims against Strand and State Farm. The court stated that there was no direct Wisconsin case law on this issue and referred to appellate decisions from other states involving similar sets of facts.

Dissent
In a dissent, Chief Justice Ziegler (joined by Justices R. Bradley and Roggensack) argued that Strand's conviction precluded any claim against State Farm by Strand or Dostal. To secure a conviction of second-degree reckless homicide in Wisconsin, the state must prove beyond a reasonable doubt that a defendant caused a death and "was aware that his or her conduct created the unreasonable and substantial risk of death or great bodily harm." The dissent noted that some Wisconsin juries, including in this case, have been instructed that the definitions of "criminal recklessness" and "accident" are inconsistent with one another, and that the defense of accident can be employed to defeat the "awareness" aspect of criminal recklessness. Therefore, in Strand's case, "the jury explicitly rejected the possibility that [the] death was an 'accident.'"

Dostal v. Strand WCJC disagrees with this decision.	
Justice Walsh Bradley	Wrote opinion
Justice Dallet	Concurred
Justice Hagedorn	Concurred
Justice Karofsky	Concurred
Chief Justice Ziegler	Wrote dissent
Justice R. Bradley	Dissented
Justice Roggensack	Dissented

Other Cases of Interest to the Wisconsin Business Community

***Lamar Central Outdoor, LLC v. Division of Hearings & Appeals*, 2019 WI 109**

In a 7-0 decision (Justice Kelly), the court held that state agencies must engage in rulemaking to change their interpretation of an ambiguous statute. Specifically, the court held that the Department of Transportation was required to promulgate a rule when it changed its interpretation of statutes regarding nonconforming billboards.

***Wisconsin Legislature v. Palm*, 2020 WI 42**

In a 4-3 decision (Chief Justice Roggensack, joined by Justices R. Bradley, Kelly, and Ziegler), the court held an emergency order issued by the Department of Health Services should have been promulgated according to the emergency rulemaking procedures set forth in Wis. Stat. Ch. 227. The court also found that the scope of the emergency order, purporting to confine all people to their homes, forbidding all "non-essential" travel, and closing all "non-essential" businesses, exceeded the department's statutory authority, even in an emergency situation. Justices Walsh Bradley, Dallet, and Hagedorn filed separate dissents and joined one another's opinions.

***Papa v. DHS*, 2020 WI 66**

In a 6-0 decision (Justice Ziegler), the court held that the Department of Health Services did not have statutory authority to enforce the auditing and claw-back policies it used to recoup payments from Medicaid providers. In a partial dissent, Justice Kelly (joined by Justice R. Bradley) agreed with the court except on its denial of the plaintiffs' request to impose costs on the department.

***Fabick v. Evers*, 2021 WI 28**

In a 4-3 decision (Justice Hagedorn, joined by Justice R. Bradley, Chief Justice Roggensack, and Justice Ziegler), the court held that the governor cannot issue multiple, successive public health emergency declarations on the same subject without legislative approval. The case involved a series of successive statewide public health emergencies (and attendant indoor mask mandates) declared by Gov. Evers throughout 2020 and into 2021. Wis. Stat. Ch. 323 allows the governor to declare a state of public health emergency but limits the term of the emergency to 60 days unless extended by the Wisconsin Legislature. Justice Walsh Bradley (joined by Justices Dallet and Karofsky) filed a dissent.

***Tavern League of Wisconsin v. Palm*, 2021 WI 33**

In a 4-3 decision (Chief Justice Roggensack, joined by Justices Ziegler and R. Bradley, with Justice Hagedorn concurring), the court held that an emergency order issued by the Department of Health Services met the criteria defining an administrative rule and thus should have been promulgated according to the rulemaking procedures in Wis. Stat. Ch. 227. The emergency order purported to limit the size of indoor public gatherings. Justice Walsh Bradley (joined by Justices Dallet and Karofsky) filed a dissent.

***Wisconsin Manufacturers and Commerce v. Evers*, 2022 WI 38**

In a 4-3 decision (Justice Dallet, joined by Justices Walsh Bradley, Hagedorn, and Karofsky), the court held that the public records law's general prohibition on pre-release judicial review barred the plaintiffs' claims. The case involved a public records request by media outlets to the governor and state agencies seeking a list of all Wisconsin businesses with more than 25 employees that had at least two employees test positive for COVID-19. Chief Justice Ziegler (joined by Justices R. Bradley and Roggensack) filed a dissent.

Appendix of Selected Cases

2019-20 Term

Veritas Steel, LLC v. Lunda Construction Co., 2020 WI 3 (Successor Liability)

Choinsky v. Employers Insurance Co. of Wausau, 2020 WI 13 (Insurer Duty to Defend)

Lang v. Lions Club of Cudahy Wisconsin, Inc., 2020 WI 25 (Recreational Immunity)

Emer's Camper Corral, LLC v. Alderman, 2020 WI 46 (Insurance Malpractice)

2020-21 Term

Mohns Inc. v. BMO Harris Bank N.A., 2021 WI 8 (Discovery Violations)

Stroede v. Society Insurance, 2021 WI 43 (Trespasser Immunity)

Graef v. Continental Indemnity Co., 2021 WI 45 (Worker's Compensation)

Kemper Independence Insurance Co. v. Islami, 2021 WI 53 (Homeowners Insurance)

Clean Wisconsin, Inc. v. DNR, 2021 WI 72 (Statutory Construction)

2021-22 Term

Townsend v. ChartSwap, LLC, 2021 WI 86 (Health Care Record Fees)

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Colectivo Coffee Roasters, Inc. v. Society Insurance, 2022 WI 36 (Property Insurance)

Murphy v. Columbus McKinnon Corp., 2022 WI 109 (Product Liability)

Dostal v. Strand, 2023 WI 6 (Wrongful Death)