Significant decisions of the Wisconsin Supreme Court and Court of Appeals

January 2017 to December 2018

Substantial fault standard under unemployment insurance

In *Operton v. Labor and Industry Review Commission*, 2017 WI 46, 375 Wis. 2d 1, 894 N.W.2d 426, the supreme court held that Lela Operton's conduct did not satisfy the "substantial fault" standard enacted by the legislature and therefore did not disqualify her from receiving unemployment insurance (UI) benefits after her termination from employment.

In 2013, the Wisconsin Legislature enacted various changes to the UI law as part of the 2013-15 state budget act. Among the changes was a provision that disqualified an individual from receiving UI benefits if he or she was terminated for "substantial fault." The act defined substantial fault as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer." The act, however, also included three enumerated exceptions to the standard, which, if satisfied, were not to be considered substantial fault. One such exception provided that substantial fault did not include "[o]ne or more inadvertent errors made by the employee." Also included in the act were changes to the even more severe misconduct standard, which had long been governed by the landmark case *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). The act codified the *Boynton Cab* standard into the statutes and also delineated a number of additional specific grounds for which a person could be found to have committed misconduct.

The case concerned the application of the substantial fault standard to Operton, who worked as a clerk at a Walgreen's store from 2012 to 2014. During her employment, Operton made a number of errors that resulted in monetary losses to Walgreen's, the last of which was her acceptance of a stolen credit card for payment for a loss of nearly $400. Operton was terminated and applied for UI benefits, which Walgreen's contested. The Department of Workforce Development (DWD) found in an initial determination that Operton's errors had constituted misconduct. On appeal, however, a DWD administrative law judge found that Operton's conduct constituted substantial fault, not misconduct, a finding upheld by the Labor and Industry Review Commission (LIRC) on appeal. Operton appealed further, with the circuit court upholding LIRC's findings and determination. The

court of appeals, however, reversed the circuit court, finding that LIRC was owed no deference in its interpretation of the relatively new statute and that LIRC had erred in its construction of the statute.

LIRC appealed to the supreme court, which affirmed the holding of the court of appeals in an opinion written by Chief Justice Roggensack. In discussing the level of deference to be accorded to LIRC, the supreme court held that, because LIRC had not given an articulated interpretation of the statute, the court would not assign a level of deference and would proceed to interpret the statute under established principles of statutory construction. The court then proceeded to analyze the text of the substantial fault exception for inadvertent errors, noting the lack of limitations on the exception, and found that Operton's conduct represented a series of inadvertent errors, each of a similar, but distinct, nature. Because of this, the court found that Operton's conduct fell within the one or more inadvertent errors exception and was therefore not considered substantial fault under the statute.

Three justices each wrote separate concurring opinions, each of which addressed the issue of agency deference. Justice Abrahamson concurred in an opinion joined by Justice A.W. Bradley; Justice Ziegler concurred in a separate opinion; and Justice R.G. Bradley concurred in an opinion joined by Justice Gableman and Justice Kelly. In her concurring opinion, Justice Abrahamson also criticized language in the majority opinion suggesting that inadvertent errors that were repeated or for which warning had been given could constitute substantial fault.

Mining permit

In *AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368, the supreme court held that the Trempealeau County Environment & Land Use Committee properly denied AllEnergy Corporation's request to open a frac sand mine. Frac sand is a special type of sand used in fracking, also known as hydraulic fracturing. In fracking, explosives are used to create cracks deep underground. Water, chemicals, and frac sand are then injected into the cracks to hold them open to allow oil or natural gas to seep out into wells.

AllEnergy wanted to open a frac sand mine in Trempealeau County. However, the desired site was located in an agriculture zoning district. Trempealeau County's zoning ordinance allowed frac sand mining in an agriculture zoning district as a conditional use, which meant that AllEnergy needed to obtain a conditional use permit from the county before opening the mine.

Under the county's zoning ordinance, the Trempealeau County Environment

& Land Use Committee could approve a conditional use permit only if the committee determined that "the proposed use at the proposed location will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area." The ordinance also included factors to consider when determining whether to grant or deny a conditional use permit, specifically: whether the mine would be a "wise use of the natural resources of the county"; the "aesthetic implications of the siting of such a mine at [that] location"; and "the impacts of such a mining operation on the general health, safety and welfare of the public."

The committee held a public hearing on AllEnergy's application for a conditional use permit. The committee identified conditions that could be placed on the proposed permit to address environmental and health concerns raised during the public hearing. However, the committee ultimately denied AllEnergy's application for the conditional use permit.

AllEnergy sought review in the circuit court, which upheld the committee's decision to deny the permit. The court of appeals also upheld the denial, and AllEnergy appealed to the Wisconsin Supreme Court.

The supreme court issued a split decision. In a lead opinion written by Justice Abrahamson and joined by Justice A.W. Bradley, and in a concurrence written by Justice Ziegler and joined by Chief Justice Roggensack, the four justices rejected AllEnergy's argument that the committee had exceeded its jurisdiction when the committee denied the conditional use permit. The court held that the committee had properly considered and applied the factors required to be considered under the county's zoning ordinance, including use of the county's natural resources, aesthetic implications, and impacts on the general health, safety, and welfare of the public, as well as adverse effects on the environment, including water quality, groundwater, and wetlands.

The court also rejected AllEnergy's argument that the committee's decision was arbitrary and capricious because it was not based on sufficient evidence. The court found that there was sufficient evidence in the record supporting the committee's decision.

Justice Abrahamson and Justice A.W. Bradley went further, examining and rejecting AllEnergy's argument that the zoning ordinance's requirement to consider the impacts of the mine on "the general health, safety and welfare of the public" was unconstitutionally vague and its argument that an applicant for a conditional use permit has a right to that permit if the applicant meets the conditions of the ordinance and if any adverse impacts can be addressed by imposing conditions on the permit.

Justice Kelley, joined by Justice Gableman and Justice R.G. Bradley, dissented.

In their view, the fact that Trempealeau County's zoning ordinance allowed frac sand mining as a conditional use within an agriculture zoning district meant that the county had already determined that frac sand mining was an appropriate use of the property in question. The dissenting justices believed that the only question, then, was whether there were conditions that could be imposed on the proposed mine that would alleviate the environmental and health concerns that had been raised. The dissenting justices would have reversed the decision of the lower court and remanded the matter back to the committee for further proceedings.

Failure to correct inaccurate criminal history report

In *Teague v. Schimel*, 2017 WI 56, 375 Wis. 2d 458, 896 N.W.2d 286, the supreme court held that the Department of Justice's failure to prospectively correct an inaccurate criminal history report constituted a violation of procedural due process.

The Department of Justice (DOJ) is required by statute to maintain a centralized criminal history database of individuals who have come into contact with Wisconsin's criminal justice system and to provide a criminal history report to anyone who requests one. Although the database contains fingerprints and can be searched by fingerprint, a name-based search of the database is faster, cheaper, and easier to perform than a fingerprint-based search.

Dennis Teague's name was listed as an alias of another individual in the DOJ's criminal history database after the other individual allegedly stole Teague's identity. Therefore, any time a name-based search was requested for Teague, the DOJ's report indicated that he had a criminal record when, in fact, he did not. DOJ was aware that its criminal history reports were unreliable and was aware of Teague's situation. DOJ's procedure for an individual who is the subject of a false report is for the individual to request an "innocence letter" from DOJ. The innocence letter verifies that a fingerprint-based search of DOJ's criminal history database shows that, as of the date of the letter, the individual has no criminal history. However, because the innocence letter does not remove the associative information from the database, the innocence letter does not cover any future criminal activity in Teague's case that is committed by the individual with Teague's name listed as an alias.

Teague, along with two other similarly aggrieved individuals, challenged the actions of DOJ on the grounds that DOJ is required by statute to correct its record production when it inaccurately ascribes a criminal history to an innocent person and that failure to correct the false report violates both procedural and substantive due process.

Section 19.70, Wisconsin Statutes, provides that an individual may challenge the accuracy of a record that contains personally identifiable information

pertaining to the individual that is maintained by an authority—in this case, DOJ—and, if the authority agrees that the information is incorrect, the authority must correct the information. In an opinion written by Justice Kelly, the supreme court considered this statutory requirement but determined that, although it applied to his case, it was not an adequate remedy for Teague because the statute only provides retroactive correction and does not offer prospective relief.

The court next found that DOJ's practices deprived Teague of his right to due process of law. The court stated that, because the stigma caused by DOJ's criminal history search report imposes a tangible burden on Teague's ability to obtain or exercise a variety of rights and opportunities recognized by state law, he has been deprived of a liberty interest, and the procedural safeguards found in section 19.70, Wisconsin Statutes, and DOJ's innocence letter were insufficient to protect that liberty interest.

Because the court found that procedural due process was violated, the court did not engage in an analysis of whether substantive due process was violated in the case. The court remanded the case to the circuit court to determine an appropriate remedy.

Justice Abrahamson concurred in an opinion joined by Justice A.W. Bradley. Justice Gableman concurred in a separate opinion joined by Chief Justice Roggensack. Justice Ziegler dissented.

Property tax assessment

In *Milewski v. Town of Dover*, 2017 WI 79, 377 Wis. 2d 38, 899 N.W.2d 303, the supreme court held that property owners were entitled to a hearing to contest their property tax assessment even though they did not allow a tax assessor to view the interior of their home.

Vincent Milewski and Morganne MacDonald (the Milewskis) owned property in the Town of Dover. As part of a town-wide revaluation program, the assessor requested permission to view the Milewskis' property, but the Milewskis refused to allow the assessor to view the inside of their home. The assessor later increased the assessed value of the Milewskis' property by 12 percent, and the Milewskis filed an objection with the board of review based on excessive assessment. The board of review refused to hear the objection, relying on state law that prohibits a property owner from challenging a property tax assessment if the owner refused to allow an assessor to view the property. The Milewskis sued claiming that the law was unconstitutional as applied to them.

The supreme court issued a split decision. In the lead opinion written by Justice Kelly and joined by Justice R.G. Bradley, the two justices concluded that the town, by requiring the Milewskis to allow the assessor to view the interior

of their property as a precondition to challenging their property tax assessment, violated the Milewskis' due process rights. In reaching that conclusion, the lead opinion found that an assessor "viewing" the interior of a building conducts a search within the meaning of the Fourth Amendment to the U.S. Constitution and that the search would be unconstitutional without a warrant or consent.

Chief Justice Roggensack concurred in the mandate that the Milewskis were entitled to a hearing to contest their tax assessment; however, the concurrence did not address the constitutional issues raised in the lead opinion. Rather, the concurring opinion concluded that the Milewskis complied with the property-viewing requirement by allowing the assessor to view the exterior of their property.

Justice Ziegler also concurred in the mandate in a separate opinion joined by Justice Gableman. The concurring opinion objected to the lead opinion relying on a doctrine that the parties did not address in their briefing and concluded that the case should be decided on narrow grounds.

Justice Abrahamson dissented in an opinion joined by Justice A.W. Bradley. The dissent agreed that an assessor entering a building to view its interior is a search under the Fourth Amendment. The dissent concluded, however, that the Milewskis were afforded due process. According to the dissent, the challenged statutes offered the Milewskis an inducement to consent to the assessor's search by imposing a reasonable and constitutional limit on the ability of the property owners to contest the amount of the assessment if the property owners prevent the assessor from having an actual view of the property.

Building permit rule

In *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, 381 Wis. 2d 704, 913 N.W.2d 118, the supreme court expanded the building permit rule to cover all land identified in a building permit application as part of the project.

Golden Sands Dairy LLC obtained a building permit from the town of Saratoga to build seven farm structures on 100 acres of land that comprised part of more than 6,300 acres of land that Golden Sands owned or was under contract to purchase for a planned farming operation. After Golden Sands filed the application, the town enacted a zoning ordinance that prohibited agricultural uses such as those proposed by Golden Sands. Golden Sands asked the court for a declaration that, even though the zoning for the land had changed, Golden Sands had a vested right to use all of the land identified in the application for agricultural purposes.

In a majority opinion written by Justice Gableman, the supreme court held that the building permit rule applied and extended to all land identified in Golden Sands' application, including the land upon which no actual building construction was planned. The majority noted that Wisconsin has long followed a doctrine

known as the "building permit rule," which provides a vested right to an applicant to build a structure upon the filing of a building permit application that strictly conforms to all applicable zoning regulations. Because the rule creates a definite moment in time at which rights vest, it is commonly referred to as a "bright-light" rule. Under the building permit rule, an applicant's rights are vested even if the zoning regulations change before the application is granted or before the building is constructed. The court noted that the purpose of the bright-line rule is to create predictability for land owners, purchasers, developers, municipalities, and the courts by balancing a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification.

The majority concluded that the policy underlying the building permit rule supported extending the rule to all land specifically identified in a building permit application. In other words, the court held that the building permit rule gives an applicant a vested right to use all land specifically identified in a building permit application consistent with zoning regulations in effect at the time a building permit application is filed if the application strictly conforms to all applicable zoning regulations.

The majority limited the scope of its ruling by specifying that any vested rights in the land would expire when the building permit expires. Thus, any land not in use at the time a building permit expires would not benefit from the building permit rule, and future use of that land must comply with any zoning ordinances then in effect.

Justice Abrahamson dissented in an opinion joined by Justice A.W. Bradley.

Challenges to the use of tax incremental financing by a municipality

In *Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131, the supreme court dismissed challenges regarding the use of tax incremental financing (TIF) to support redevelopment projects in the city of Eau Claire but allowed challenges to be brought under the more limited method of certiorari review.

The case arose out of the use of TIF to finance a redevelopment project in downtown Eau Claire known as the Confluence Project. Under current Wisconsin law, a municipality can use TIF to create a tax incremental district (TID), and the increased taxes that are paid by property owners within the TID because of development in the TID and the resulting rise in property values are then allocated to pay back certain costs incurred by the creating municipality. The expansion or creation of a TID may occur only if the municipality adopts findings that the property satisfies one of four criteria, one of which is that at least 50 percent of the

property is blighted. In addition, a TID must be approved by a joint review board (JRB), which must find that development would not occur without the use of a TID.

In the fall of 2014, the city of Eau Claire's Common Council voted to expand an existing TID and create a new TID to support the Confluence Project, finding that not less than 50 percent of the areas in question were blighted areas as defined in the statute. In addition, the JRB made the requisite findings that the development would not occur without the TIDs.

The plaintiffs brought suit, alleging that the city's and JRB's findings were not supported by any evidence and that they were lacking a public purpose under the constitution's public purpose doctrine and therefore void. The plaintiffs also made other allegations relating to the disbursement of cash grants pursuant to the project plan, including a claim that funds may be unlawfully used to destroy historic properties and a claim that cash grants functioned as a tax rebate in violation of the Wisconsin Constitution's uniformity clause. The plaintiffs sought both declaratory relief and certiorari review.

Following dismissal in the circuit court, the court of appeals ruled on the plaintiffs' claims, dismissing most of the claims on the grounds that the plaintiffs lacked standing but remanding for certiorari review of the city's and JRB's findings. The supreme court granted review and affirmed the court of appeal's decision, but on alternate grounds.

The supreme court first held that the findings of blight are legislative determinations that did not require any specified rationale or an itemization of supporting evidence and did not raise justiciable issues of fact or law. Therefore, the court wrote, because a court cannot issue a declaration regarding the wisdom of a legislative determination, the blight findings were not susceptible to an action for declaratory judgment. The court applied similar reasoning to findings of the JRB. In both cases, the court held, plaintiffs failed to state a case on which relief could be granted, even assuming that they had standing to bring those claims.

Regarding the uniformity clause claim, the court found that the plaintiffs had not made allegations sufficient to establish such a violation. The court also dismissed a claim regarding the potential use of TID funds for the destruction of historic buildings as having not stated sufficient factual grounds to bring a claim. The court therefore dismissed the complaint with respect to the claims for declaratory relief.

The court held, however, that what were deemed legislative determinations could be challenged through the method of common law certiorari review, which entails a more limited review and applies a presumption of correctness and validity as to the municipality's decision. The court therefore remanded the case to the circuit court for certiorari review of the determinations.

In a lengthy dissent, Justice R.G. Bradley, joined by Justice Kelly, wrote that the claims for declaratory relief should not have been dismissed. In her view, the findings made by the city were not legislative determinations but rather were matters involving factual determinations that could be reviewed by a court. The dissent would also not have dismissed the claim regarding the use of funds to destroy historic properties given the fact that money is fungible. They agreed, however, that the claim with respect to the uniformity clause was correctly dismissed, albeit on other grounds.

Agency deference

In *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, the supreme court ended the longstanding judicial practice of deferring to administrative agencies' conclusions of law.

The Department of Revenue assessed a sales tax on petitioners for work that was performed by a subcontractor conducting environmental remediation of the Fox River. After a field audit, DOR determined that the work performed constituted "processing" of tangible personal property, a service subject to sales tax under Wisconsin law. The petitioners disagreed that the work performed—dewatering and desanding of dredged, contaminated sediment—should fall under the definition of "processing" under the statute. The circuit court and court of appeals sided with DOR, and Tetra Tech EC, Inc., and its subcontractor Lower Fox River Remediation, LLC, petitioned the supreme court for review.

Generally, when a court reviews a question of law, the court applies a de novo standard of review, meaning that the court will consider the question without deference to a lower court or other lower decision maker. However, prior to the supreme court's decision in Tetra Tech, courts granted interpretations of law by an administrative agency varying levels of deference, depending on whether the agency in question was charged by the legislature with administering the law, whether the agency employed expertise in forming its interpretation, and whether the agency's interpretation provided uniformity and consistency in the law's application. Under this test, a court reviewing an administrative agency's interpretation of law gave the agency's interpretation *great weight deference*, meaning that the court would adopt an agency's interpretation if it was reasonable, even if a more reasonable interpretation existed; *due weight deference*, meaning that the court may adopt an interpretation that the court found to be more reasonable than the agency's; or *no deference* at all.

In this case, the supreme court unanimously upheld DOR's interpretation of the statute. However, the court did so without granting, or even considering whether to grant, DOR any agency deference. Instead, the court, on its own

initiative, determined to end altogether the practice of granting deference to administrative agencies on questions of law. In a lead opinion authored by Justice Kelly, the court offered a history of the agency deference doctrine, traced its roots and evolution from 1871 to the present day, reviewed the standards of great weight and due weight deference, and included a discussion of concerns raised by U.S. Supreme Court justices regarding the agency deference doctrine under federal law.

Justice Kelly's opinion offered several lines of reasoning for abandoning agency deference in Wisconsin, including that the practice violates both the separation of powers and due process; however, no part of this reasoning was agreed to by a majority of the justices. Thus, while the decision clearly ends administrative deference, the decision does so without clear reasoning by a majority. Separate concurrences authored by Justice A.W. Bradley, Justice Zeigler, and Justice Gableman each raised concerns with the lead opinion's reasoning and approach, including concerns regarding overturning well-established precedent and unnecessarily basing a decision on constitutional principles.

Cap on noneconomic damages in medical malpractice claims is constitutional

In *Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678, the supreme court held that the statutory $750,000 cap on noneconomic damages for victims of medical malpractice is constitutional.

In the 1970s, the Wisconsin Legislature established a system for paying claims alleging medical malpractice against health care providers. Under that system, health care providers must maintain a certain amount of liability insurance coverage and pay an annual assessment, which is deposited in the Wisconsin Injured Patients and Families Compensation Fund (the fund). The fund pays medical malpractice claims that exceed the health care provider's liability coverage, guaranteeing payment of 100 percent of all settlements and judgments for economic damages and up to $750,000 for noneconomic damages for each claim. The legislature has changed the cap at various times, most recently in response to a supreme court case, *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 184 Wis. 2d 573, 701 N.W.2d 440, which held that a previous $350,000 cap was facially unconstitutional.

This case arose when Ascaris Mayo visited an emergency room at a Milwaukee hospital complaining of abdominal pain and a high fever. A physician and physician's assistant advised her to follow up with her gynecologist and sent her home. Upon visiting a different emergency room the next day, Mayo was correctly diagnosed with sepsis caused by an untreated infection. Ultimately, all

four of her limbs were amputated after many of her organs failed and her limbs developed dry gangrene.

Mayo and her husband sued, alleging medical malpractice and failure to provide proper information. A jury found that, though not negligent, neither the physician nor the physician's assistant gave Mayo adequate information regarding alternative diagnoses and treatment options and awarded economic damages of $8,842,096 and noneconomic damages of $15,000,000 to Mayo and $1,500,000 to her husband. The fund moved to reduce the noneconomic damages award to $750,000 as required under the statutory cap. The circuit court, relying on *Ferdon*, held that, while the cap was not facially unconstitutional, it was unconstitutional as applied to the Mayos on equal protection and due process grounds. The court of appeals, also relying on *Ferdon*, held the cap to be facially unconstitutional.

In an opinion by Chief Justice Roggensack, the supreme court reversed the court of appeals decision, overruled *Ferdon*, and held that the cap on noneconomic damages is constitutional, both facially and as applied to the Mayos. The supreme court held that *Ferdon*'s holding invaded the policy-making function of the legislature by creating a new but unclear standard of scrutiny. The court instead applied the rational basis standard of review and held that the legislature had a legitimate government interest in imposing the cap, supported by the legislature's stated policy objectives: controlling health care costs, encouraging physicians to practice in the state, limiting defensive medicine, making noneconomic damage payments predictable, and protecting the fund's integrity. The court also held that the cap is constitutional as applied to the Mayos because there was no evidence that they were treated differently than others similarly situated and dismissed the argument that the significant balance in the fund compared to the size of the award is relevant to the constitutional claim.

Justice A.W. Bradley dissented, joined by Justice Abrahamson, asserting that the cap on noneconomic damages violates the guarantee of equal protection because the cap treats the most severely injured differently than other injured people who are similarly situated. The dissent also argued that evidence in the record shows that the cap does not achieve the legislature's stated policy objectives and therefore lacks a rational basis.

Ability of State Superintendent of Public Instruction to choose own counsel

In *Koschkee v. Evers*, 2018 WI 82, 382 Wis. 2d 666, 913 N.W.2d 878, the supreme court held that the state superintendent of public instruction was entitled to his own representation in a case where a declaratory judgment was sought regarding the state superintendent's and the Department of Public Instruction's duty to

comply with rule-making provisions contained in 2017 Wisconsin Act 57, also referred to as the "REINS Act."

In May 2011, Governor Scott Walker signed into law 2011 Wisconsin Act 21, which included provisions mandating that each agency, when proposing an administrative rule, obtain the governor's and, in one case, the Department of Administration's approval, in order for the agency to promulgate the rule. In *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, the supreme court addressed whether these provisions were unconstitutional as applied to rules promulgated by the state superintendent, a constitutional office established by article X, section 1, of the Wisconsin Constitution, and the Department of Public Instruction, which is headed by the state superintendent (collectively, SPI). The case garnered five separate opinions, with a majority agreeing that the provisions were unconstitutional because they effectively gave the governor a veto power over the SPI's rules, but with a divergence on the reasoning and the broader issues implicated.

In August 2017, Governor Walker signed into law 2017 Wisconsin Act 57, which included a number of additional provisions affecting the rulemaking process, specifically including some changes to the process by which the governor receives and then approves initial "statements of scope" for rules pursuant to 2011 Act 21. In the following November, a number of petitioners filed an original action with the supreme court seeking a declaration that the SPI was required to comply with the provisions in Act 57. Upon the filing of the petition, a dispute arose between the SPI and the Department of Justice (DOJ) regarding who would represent the SPI in the action, with DOJ indicating that it supported the position taken by the petitioners and the SPI viewing the action as frivolous in light of the recent Coyne decision. After the SPI and DOJ made competing filings on the issue of representation, the supreme court granted the petition to commence the original action and subsequently heard oral argument on the issue of representation. The court ruled on the representation issue in an unsigned order issued approximately one month after the oral argument.

The court began its order by citing its superintending and administrative authority over the courts under article VII, section 3, of the Wisconsin Constitution and the court's power, which flows from that authority, to regulate the practice of law. Deciding a question of representation of a client before the court was, the court said, within the scope of that power and authority. Moving then to the merits of the representation issue, the court ruled that the SPI was entitled to its choice of counsel. The court cited a number of grounds for reaching its decision. First, the court said, there were ethical implications for DOJ attorneys if they were to take a position in the case with which the SPI did not agree,

with the court citing a supreme court rule requiring a lawyer to withdraw from representation when discharged by a client. Second, the court observed, DOJ's position would effectively prohibit a constitutional officer, including potentially even a supreme court justice, from taking a position in court contrary to that of the attorney general, a view the court declined to adopt. Consequently, the court granted the SPI's motion to deny substitution of counsel and allowed the SPI to be represented by its own attorneys. The court also ruled that, despite his role in the contested provisions, the governor was not a necessary party to the action. In its order, the court did not address the underlying merits of the petition, leaving them for further argument.

Justice R.G. Bradley, in an opinion concurring in part and dissenting in part from the court's order and that was joined by two other justices, wrote that the majority's decision contradicted both the statutes and the constitution. Finding the constitution and the statutes to be silent on the issue of representation of the SPI in court, she viewed the issue as a matter of legislative prerogative, citing a number of authorities for the proposition that DOJ lawyers are generally the only attorneys authorized to appear in state courts on state matters. She also criticized the majority's invocation of its "ever-evolving" superintending authority in a case that was an original action before the supreme court itself, and not a lower court, cautioning that it allowed the court to use that power to disregard laws passed by the legislature. Finally, Justice R.G. Bradley dismissed the notion that there were ethical implications given that the state, and not the "nominal figurehead," was the real party in interest and that DOJ was statutorily designated to represent it.

Expunged OWI counts as prior OWI conviction

In *State v. Braunschweig*, 2018 WI 113, 384 Wis. 2d 742, 921 N.W.2d 199, a unanimous supreme court held that a prior expunged operating while intoxicated (OWI) conviction must be counted in determining the penalty for a later OWI conviction.

In 2011, Justin Braunschweig was convicted of injuring another person by operation of a vehicle while intoxicated. At the time of sentencing, the circuit court ordered the conviction expunged upon successful completion of the sentence, and the conviction was, in fact, expunged. Nearly five years after that conviction, Braunschweig was convicted of one count of OWI and one count of operating with a prohibited alcohol concentration (PAC), both as second offenses, relying on the 2011 conviction as the prior offense. Braunschweig appealed, claiming that an expunged conviction did not qualify as a prior offense for purposes of charging a later OWI or PAC as a second offense.

In an opinion written by Justice Ziegler, the supreme court affirmed the

conviction. The court explained that, in Wisconsin, a first OWI-related offense is civil, but repeat offenses are criminal, and the penalties imposed increase for each subsequent offense. The question in the case was whether a conviction that had been expunged could be counted as a prior offense for purposes of imposing increased penalties.

The court's answer turned on the statutory definition of "conviction," which excludes a conviction that is vacated. The court explained that "vacating" a conviction and "expunging" a conviction are not equivalent. Under Wisconsin law, a conviction may be expunged only under limited circumstances. Expungement is available only if, among other things: 1) the defendant is under 25 years of age at the time the crime is committed; 2) the crime has a maximum period of imprisonment of six years; and 3) the sentencing court determines that the offender will benefit from, and that society will not be harmed by, expungement. If a conviction is expunged, the court seals the case and destroys all court records related to the conviction. Expungement, the supreme court explained, is designed to provide a second chance or a fresh start to an offender.

Vacating a conviction, on the other hand, invalidates a judgment or sentence as a result of jurisdictional, constitutional, or other defects. If a conviction is vacated, it is cancelled and null and void, and it is as if there had been no judgment in the first place. In short, vacating a conviction "invalidates the conviction itself, whereas expunction of a conviction merely deletes the evidence of the underlying conviction from court records."

Thus, the court reasoned, a conviction, even if it is expunged, is still a conviction that must be counted for purposes of determining the appropriate penalty for an OWI-related offense.

Finally, the court determined that, although the court record of the 2011 conviction had been destroyed and could not be considered in the current case, other records existed that could be used to prove the existence of the 2011 conviction. The court concluded that the state had proved the 2011 conviction by a preponderance of the evidence by introducing certified copies of driving records maintained by the Department of Transportation.

Municipal authority to regulate firearms

In *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233, the supreme court held that Wisconsin statute prohibits a city and any of its subunits from regulating firearms in a way that is more stringent than an analogous state statute.

In this case, the city of Madison, through its Transit and Parking Commission, adopted a rule that prohibited city bus passengers from bringing any item

of a dangerous nature, including any pistol, rifle, knife, or sword, onto a city bus. Following adoption of this rule, the Wisconsin Legislature passed 2011 Wisconsin Act 35, which authorizes Wisconsin residents to carry a concealed weapon once he or she has obtained the required license. Additionally, section 66.0409, Wisconsin Statutes, also provides that no political subdivision may enact or enforce an ordinance or adopt a resolution that regulates firearms in a manner that is more stringent than a similar state statute. The question presented in this case was whether the city's Transit and Parking Commission, by enacting a rule, had enacted an ordinance or adopted a resolution and, if so, whether the rule regulating the carrying of weapons on board city buses was more stringent than state law and thus prohibited.

In a majority opinion written by Justice Kelly, the court held that the legislature's prohibition on a municipality from enacting an ordinance or resolution regarding firearms that is more stringent than state law necessarily includes a prohibition on any other type of legislation or action by a municipality that may result from the municipality's delegation of its legislative authority. The court concluded that the Transit and Parking Commission is a subunit of the city of Madison and that the commission is permitted to make rules only because the city has delegated its authority to the commission. Thus, the commission may only exercise authority that the city itself may also exercise. The court noted that any other conclusion would result in an absurd result allowing subunits of a city to regulate in a piecemeal fashion when the city itself, in a formal exercise of its power, may not. Therefore, the court concluded that the city through its Transit and Parking Commission had enacted an ordinance or resolution regarding firearms, and thus the court must examine whether the commission's rule was more stringent than state statutes on the topic of firearms.

The court addressed two statutes dealing with firearms to which the Transit and Parking Commission's rule could be compared. First, the court compared the rule to section 167.31 (2) (b) 1., Wisconsin Statutes, which prohibits the placing, possession, or transportation of a firearm in a vehicle unless the firearm is unloaded or a handgun. Because the Transit and Parking Commission's rule prohibited all carrying of firearms on buses, the court held that the rule was more stringent than the relevant statute and thus was prohibited under state law. The second statute to which the court compared the Transit and Parking Commission's rule was section 175.60, Wisconsin Statutes, which allows for a person to carry a concealed weapon anywhere in the state as long as the person complies with the state's licensing requirements. Though the statute does contain a few narrow exceptions, city buses are not mentioned in the statute. The court concluded that the Transit and Parking Commission's rule prohibiting the carrying of a weapon

on a city bus was substantially more stringent than the state law on the same topic and was thus prohibited under state law.

Justice A.W. Bradley and Justice Abrahamson dissented, arguing that the court's settled rules of statutory interpretation require looking first to the plain language of the statute and that, when the plain language is clear, the inquiry must stop. The dissent argued that the plain language of the statute in question only applies to ordinances and resolutions and that the city Transit and Parking Commission's rule was neither an ordinance nor a resolution. The dissent argued that the majority opinion impermissibly looked beyond the plain language of the statute in an attempt to create meaning in the statute that the legislature had not contemplated.

Executive agency authority over judges

In *Gabler v. Crime Victims Rights Board*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, the supreme court considered the constitutionality of an executive branch entity exercising authority to evaluate the actions of and impose discipline upon a judge exercising his or her judicial powers. The court held that "Wis. Stat. §§ 950.09 (2) (a), (2) (c)-(d), and (3) and 950.11 cannot constitutionally apply to judges because they invade two exclusive aspects of judicial authority: the judicial power vested in the unified court system and the disciplinary function vested in this court."

The case arose from a decision made by Circuit Court Judge William M. Gabler in January 2012 in a criminal action pending before him. Leigh M. Beebe was accused of sexual assault of two minors. Judge Gabler granted a motion for separate trials, and Beebe was convicted in the first trial in January 2012. The trial involving the second victim was scheduled for August 2012. The state requested that Judge Gabler sentence Beebe immediately for the first conviction. After expressly considering both the rights of the first victim, including the right to a "speedy disposition" of cases under section 950.04 (1v) (k), Wisconsin Statutes, and the rights of the defendant, Judge Gabler exercised his discretion to postpone sentencing in the first matter until completion of the second trial.

The first victim submitted a formal complaint to the Crime Victims Rights Board alleging that Judge Gabler's "decision to postpone sentencing abridged her speedy disposition under Wis. Stat. § 950.04 (1v) (k) and her rights to timely disposition and protection from the accused under Article I, Section 9m of the Wisconsin Constitution."

The board issued a probable cause determination concluding that Judge Gabler violated the victim's statutory and constitutional rights to a timely disposition by postponing the sentencing on the January 2012 conviction. The board then

issued a Final Decision and Order, finding that Judge Gabler met the definition of "public employee" and "public official" for purposes of section 950.09 (2) (a), Wisconsin Statutes, and "was therefore subject to the Board's statutory authority to determine whether he violated the rights of a crime victim under Wis. Stat. ch. 950, Wis. Stat. ch. 938, or [A]rticle I, [S]ection 9m of the Wisconsin Constitution, and to impose a remedy for any rights violation found." The board concluded that Judge Gabler violated the first victim's constitutional right to timely disposition of the case in which she was a victim and, as a remedy, issued a Report and Recommendation directed to Judge Gabler consistent with its Final Decision and Order.

Judge Gabler sought circuit court review of the board's decision under chapter 227, Wisconsin Statutes. The circuit court reversed the board's decision and remanded the matter to the board with instructions to dismiss the complaint against Judge Gabler with prejudice. The board appealed. The supreme court subsequently granted Judge Gabler's petition to bypass the court of appeals.

In an opinion written by Justice R.G. Bradley, the supreme court first found that the challenged statutory provisions violate the separation of powers doctrine and are unconstitutional as applied to judges. The court framed the issue in the case as a fundamental constitutional question relating to separation of powers, stating: "May an executive agency, acting pursuant to authority delegated by the legislature, review a Wisconsin court's exercise of discretion, declare its application of the law to be in error, and then sanction the judge for making a decision the agency disfavors? Applying separation of powers principles, we conclude that the answer to this question is unequivocally no." The court found that it is the "province and duty of the judicial department to say what the law is" and that permitting an executive agency to review judges' decisions "for compliance with the victims' rights law would upend the constitutional structure of separated powers, which allocates independent judicial power to the courts." The court also found that allowing the board to impose penalties against a judge, including potential financial forfeitures, could interfere with judicial decision-making and would "contravene" the constitution's "careful allocation of governmental powers."

The court also found that the board's assertion of authority over judges was unconstitutional because it would infringe on the supreme court's exclusive authority to discipline judges, established under article VII, section 11, of the Wisconsin Constitution, which states that "[e]ach justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature." The court also noted that section 757.83 (1) (a), Wisconsin Statutes, establishes the judicial commission, which investigates and prosecutes allegations of judicial misconduct. The court stated that, if the commission's prosecution of a judge results in

a recommendation for discipline, it is the supreme court that reviews the commission's findings and determines appropriate discipline. The court found that "[a]llowing the Board to take disciplinary action against judges under Wis. Stat. § 950.09 (2) (a), (c) and (d) would clearly contradict the constitution."

While acknowledging that the court does not decide constitutional questions if a case can be resolved on other grounds, the court found that this case was "incapable of resolution without deciding the constitutional conflict presented by the Board's exercise of its statutory powers."

Accordingly, the court affirmed the decision of the circuit court, holding that "Wis. Stat. §§ 950.09 (2) (a) and (2) (c)-(d) and (3) and 950.11 (2015-16) are unconstitutional with respect to judges" and that the board's actions against Judge Gabler were void. The court emphasized, however, that its holding "does not constrain individuals or groups from criticizing judges" and also reaffirmed the court's "commitment to upholding the crime victims' rights enshrined in our statutes and constitution."

Justice Abrahamson wrote separately, concurring in part and dissenting in part, finding that the majority could have, and should have, interpreted the relevant statutes in a manner to uphold the constitutionality of the statutes, stating that "[a]s properly interpreted, the challenged provisions of Chapter 950 are constitutional with respect to judges." Justice Abrahamson nonetheless concurred with the result of the case, finding that judges were *not* "public officials" within the meaning of the challenged statutes and that therefore the challenged statutory provisions were not applicable to judges.

Justice A.W. Bradley did not participate.

Lifetime GPS tracking for sex offenders

In two cases decided in 2018, Wisconsin courts considered and upheld the constitutionality of Wisconsin's lifetime global positioning system (GPS) tracking requirements for persons convicted of certain sex crimes.

In *State v. Muldrow*, 2018 WI 52, 381 Wis. 2d 492, 912 N.W.2d 74, the supreme court unanimously upheld a guilty plea where the defendant was not informed prior to the plea that he would be subjected to a lifetime GPS tracking requirement if he pled guilty.

DeAnthony Muldrow pled guilty to second-degree sexual assault, an offense that subjected him to the lifetime GPS tracking requirement under Wisconsin law. A guilty plea must be entered voluntarily, with full knowledge of the nature of the charge and the potential punishment if convicted. Under Wisconsin law, a court is statutorily required to notify a defendant of the nature of the charge and the punishment that may be imposed if he or she pleads guilty. Muldrow was not

informed of the GPS requirement before he pled guilty, and so Muldrow moved to have his guilty plea withdrawn on the basis of a due process violation. The circuit court and court of appeals both held that the GPS tracking requirement did not constitute a "punishment," and therefore the court was not required to inform Muldrow before the plea was entered that he may be subjected to lifetime GPS monitoring.

The supreme court agreed that the lifetime GPS tracking requirement is not a "punishment." Under Wisconsin law, certain serious sex offenders are subject to the GPS tracking requirement. While it is referred to as a "lifetime" requirement, a court can terminate the requirement under the following circumstances: upon a petition to terminate tracking if the offender is permanently physically incapacitated, if the offender moves out of state, or after tracking has been in place for at least 20 years. In determining whether GPS tracking constitutes a punishment, the court analyzed whether the intent or effect of lifetime GPS tracking is punitive. The court found that GPS tracking did not meet the intent-effects test and therefore was not punitive in nature.

In its analysis, the court compared Wisconsin's GPS tracking requirement to a similar requirement under Michigan law. The court noted that, unlike the Michigan law, which fell under that state's penal statutes, Wisconsin's law fell under the statutes primarily concerning safeguards to protect the public from persons convicted of criminal content, with the stated intent to provide "a just, humane[,] and efficient program of rehabilitation of offenders." The court noted that the provisions allowing termination of tracking are "tailored to ensure that an offender is tracked only when he poses a threat to Wisconsin residents."

Having found that the intent of the GPS tracking was not punitive, the court turned to an analysis of whether the effect of the GPS tracking requirement was punitive. The court found that it was not because it did not involve a significant affirmative disability or restraint, has not historically been regarded as punishment, is not aimed at deterrence or retribution, and is not imposed based on new, uncharged criminal conduct, and that the tracking requirement has a rational relationship to a nonpunitive purpose.

In *Kaufman v. Walker*, 2018 WI App 37, 382 Wis. 2d 774, 915 N.W.2d 193, the court of appeals again upheld the lifetime GPS tracking requirement against a challenge that it 1) violates the ex post facto clause of the U.S. Constitution and its counterpart in the Wisconsin Constitution; 2) violates the Fourth Amendment of the U.S. Constitution; and 3) violates due process.

The *ex post facto* clause prohibits the passage of any law that would impose a punishment for a crime retroactively. Because James Kaufman was convicted for sex crimes in 1998 and the lifetime GPS tracking requirement was passed in

2005, Kaufman argued that the imposition of this requirement violated the *ex post facto* clause. However, the court of appeals noted that a law can be an *ex post facto* law only if it imposes punishment, and, as established by the supreme court under *Muldrow*, the GPS tracking requirement is not punitive. Therefore, the court of appeals reasoned, imposition of the law against Kaufman did not violate the ex post facto clause.

Second, Kaufman argued that the lifetime GPS tracking constituted an unreasonable search and violated his Fourth Amendment rights. The court of appeals disagreed, finding that the search was reasonable, that repeat sex offenders have diminished privacy expectations, and that Wisconsin has a particularly strong interest in reducing recidivism through the use of GPS tracking. The court of appeals further held that the GPS program services "the recognized 'special needs' of deterring future crimes and gathering information needed to solve them." Adopting the concurrence from a case out of the Seventh Circuit Court of Appeals that analyzed whether the Wisconsin GPS requirement violated the Fourth Amendment, the court in Kaufman's case stated that "in light of the State's special need to protect children from sex offenders, the GPS's relatively limited scope, and Kaufman's diminished expectation of privacy, the GPS monitoring program constitutes a special needs search."

Finally, the court responded to Kaufman's argument that the GPS tracking requirement violated due process because the statute does not require an individualized determination as to the reasonableness of the requirement in each case. The court did not agree with this argument, noting that the GPS requirement is imposed based on prior convictions rather than current dangerousness and therefore no further procedural protections are necessary.

Breach of contract; tenured professor

In *McAdams v. Marquette University*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708, the supreme court held that Marquette University breached its contract with a professor when it suspended him.

A student at Marquette University wanted the issue of gay rights to be open for discussion in a class. The graduate student teaching the class told the student, in an after-class conversation, that certain opinions were not appropriate and that homophobic comments would not be tolerated in the class. The student secretly recorded the conversation and provided a copy of the recording to John McAdams, a political science professor at Marquette. McAdams wrote a blog post criticizing the graduate student for foreclosing debate and included the graduate student's name and contact information. McAdams promoted the blog post and sent the recording of the graduate student to local and national

news outlets and other bloggers. McAdams had previously used the idea of a mention on his blog as a threat to others at the university. The graduate student received a number of violent and threatening messages and ultimately transferred to another university.

A university hearing committee made up of seven tenured faculty members unanimously found that Marquette had cause to discipline McAdams and recommended that he be suspended for up to two semesters. The president of the university agreed and suspended McAdams for two semesters but also made McAdams's return contingent on writing a private letter of apology to the graduate student. McAdams refused to write the letter and sued the university for breach of contract.

The circuit court dismissed McAdams's complaint. The court held that McAdams had agreed in his contract to abide by the university's disciplinary procedure; that he was afforded due process during the faculty committee hearing; and that the committee's and university president's findings deserved deference.

The supreme court, in an opinion by Justice Kelly, reversed the circuit court. The supreme court decided not to defer to the committee's and president's findings because the university and McAdams never agreed that the university's discipline procedure would replace or limit their ability to litigate in court. The court also refused to defer because, while the faculty statutes included a detailed procedure for the faculty hearing committee to follow, the final decision on discipline was up to the university's president, and there were no procedures in the faculty statutes for how the president was to make that decision. The court also found that the faculty hearing committee's impartiality was tainted because one member had previously made her opinion about McAdams's actions public. Finally, the court noted that the faculty hearing committee was an advisory body only and that the court would not defer to advice.

Having decided not to defer to the faculty hearing committee or university president, the court went on to look at the merits of the case. The university's faculty handbook ensured the concept of academic freedom for university professors, including for statements made as a citizen outside the scope of a professor's university activities. The parties and the court relied on policy documents from the American Association of University Professors, which state that "a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position" and that "a final decision should take into account the faculty member's entire record as a teacher and scholar." The court interpreted this as a two-part test and looked exclusively at whether McAdams's blog post, taken by itself, clearly demonstrated that he was unfit for his position. The court noted

that there is no law or university rule that prohibited McAdams from naming a student in a blog post, publishing a student's contact information, or distributing the secretly made recording of the student. The court held that the blog post did not clearly demonstrate that McAdams was unfit for his position and that the blog post was therefore protected under the doctrine of academic freedom. As such, the university breached its contract with McAdams when it suspended him. The court ordered the university to reinstate McAdams with back pay.

Justice A.W. Bradley, joined by Justice Abrahamson, dissented. In their view, the majority disregarded the "mutually agreed-upon and time-honored" shared governance process under which a university president relied on the findings of a committee made up of faculty peers and noted that the committee, not the court, observed the demeanor of witnesses and was in a position to assess credibility. The dissenting justices determined that "[t]he revealing of a student's contact information for the purpose of holding that student up for public ridicule and harassment is not a protected act of academic freedom." BB