



BY JEFF M. BROWN

Wisconsin Supreme Court 2022-23 Term: It's a Wrap



The Wisconsin Supreme Court issued fewer 4-3 decisions but decided major issues during the 2022-23 term. As the court opens the 2023-24 term this month, we look back at the 45 substantive decisions issued in the 2022-23 term and ask a civil litigator and a former public defender for their insights.





The Wisconsin Supreme Court's 2022-23 term marked a departure from the preceding three terms, as the court handed down only one case related to the COVID-19 pandemic and only one election law decision. The court did issue major decisions on products liability law, the interpretation of insurance contracts and the admissibility of evidence of insurance settlements, and medical-records fees. The court also issued several important decisions relating to civil procedure.

Drop in Number of 4-3 Decisions

The court issued 45 substantive decisions (not including disciplinary decisions), seven fewer than in the term before.

Fourteen of those decisions, or 31%, were decided by a 4-3 vote. That number is down from the 2021-22 term's historical high of 54% (4-3 decisions amounted to 37% of those handed down in the 2020-21 term).

Alan Ball, a history professor at Marquette University who compiled the statistics used in this article, said that reductions in the respective coherence of the court's conservative and liberal blocs is behind the drop in the number of 4-3 decisions. When each bloc hung together, Ball said, more 4-3 decisions were inevitable.

According to Susan Tyndall, a civil litigator at Habush Habush & Rottier S.C. in Waukesha, the drop in the number of 4-3 decisions doesn't mean that attorneys should change their strategy when arguing before the state's high court.

"The basic strategy – crafting a strong legal argument – remains the same," Tyndall said. "However, appellate practitioners should also consider the arguments accepted in last term's cases and assess whether similar arguments might exist in support of their positions."

No Clear Swing Vote in 2022-23 Term

In the 2021-22 term, Justice Brian Hagedorn voted with the majority in 24 of the 31 4-3 decisions. That number was eight more than any other justice and made it clear that Hagedorn, who voted with the conservative bloc in 12 cases and with the liberal bloc in the other 12, was the court's swing justice.

In the 2022-23 term, there was no clear swing vote. Three justices – Hagedorn, Justice Ann Walsh Bradley, and Justice Jill Karofsky – each

voted with the majority in 10 of the 14 cases decided by a 4-3 vote.

While Hagedorn cast the deciding vote in 86% of the 4-3 decisions in the 2021-22 term, he did so 71% of the time in the 2022-23 term.

In half (seven) of the 2022-23 term's 4-3 decisions, Hagedorn voted with the liberal bloc, made up of A.W. Bradley, Karofsky, and Justice Rebecca Dallet. Hagedorn voted with the conservative bloc, made up of Chief Justice Annette Ziegler, Justice Patience Roggensack, and Justice Rebecca Bradley, in three 4-3 decisions.

Ball said one reason for the reduction in Hagedorn's role as the swing vote was "slippage" in the coherence of the conservative bloc. In the 2021-22 term, the three conservative justices voted together in 92% of the cases. In the 2022-23 term, they voted together in 72% of the cases.

"It's certainly a significant change," Ball said. "There's a little bit of a change in the number for the liberals, but a much more dramatic fragmenting of the bloc with the conservatives. Of the three [in the conservative bloc], my impression is that one that's most likely to go her own way is Justice Rebecca Bradley. Roggensack and Ziegler seemed much more often in lock step."

In the 2021-22 term, the three liberal justices voted together in 86% of 4-3 decisions. In the 2022-23 term, they voted together in 71% of the 4-3 decisions.

"As far as the liberal three, if that trio splits apart, it seems to me the justice most likely to go her own way, at least in criminal cases, is Karofsky," Ball said.

The four 4-3 decisions in which Justice Hagedorn was not the swing vote were decided by the following majorities: A.W. Bradley, Roggensack, Dallet, Karofsky (2); Roggensack, Ziegler, R.G. Bradley, Karofsky (1); and A.W. Bradley, R.G. Bradley, Dallet, and Karofsky (1).

Tyndall attributes the decline in Hagedorn's role as swing justice to the subject matter of the cases the supreme court decided in 2022-23.

"This is likely the result of the nature of the specific cases before the court," Tyndall said. "Justice Hagedorn continues to be a swing vote, as evidenced by his joining the majority in *Fleming v. Amateur Athletic Union of the United States*, and the dissent in *Murphy v. Columbus McKinnon Corporation*."

SUMMARY

The Wisconsin Supreme Court handed down a higher percentage of 5-2 and 6-1 decisions in the 2022-23 term than it did the previous term. But major decisions on products liability law, insurance contracts, and medical records fees, as well as one interpreting the constitutional requirements for ballot measures, were decided by a 4-3 margin. The court issued 45 substantive decisions in 2022-23.

Bloc Alignment

Several pairs of justices anchored each bloc by consistently voting together.

For instance, Chief Justice Ziegler and Justice Roggensack voted together in 36 of the 43 cases in which they both participated (84%) and Ziegler and Justice R. Bradley voted together in 38 of the 45 cases in which they both participated (84%).

Justice Dallet and Justice A.W. Bradley voted together in 40 of 45 cases in which they both participated (89%), while Justice Karofsky and A.W. Bradley voted together in 38 of the 45 cases in which they both participated (84%).

Rise in Number of 5-2 and 6-1 Decisions

While the number of 4-3 decisions as a percentage went down in 2022-23, the number of 5-2 and 6-1 decisions as a percentage went up.

In 2021-22, 14% of the 52 decisions were decided by a 5-2 (8%) or 6-1 or 5-1 vote (6%). In 2022-23, 22% of the 45 decisions were decided by a 5-2 or 4-2 vote, and 11% were decided by a 6-1 vote.

Ball said the breakdown in cohesion of the conservative bloc is the biggest reason for the jump in 5-2 decisions. Justice Roggensack's retirement could lead to an increase in 5-2 decisions in the 2023-24 term, Ball said.

"It will be interesting to see what happens next term, when you take one of the conservatives out and replace her with [Justice Janet] Protasiewicz, who people are supposing is going to be a liberal," Ball said. "You would expect that the 5-2 percentage would go even higher."

Dissents and Concurrences

Chief Justice Ziegler wrote the most dissents in 2022-23, with eight. Justice Roggensack wrote six, Justice A.W. Bradley and Justice R. Bradley each wrote five, Justice Dallet wrote four, and Justice Hagedorn and Justice Karofsky each wrote three.

Justice R. Bradley wrote the most concurrences in 2022-23, with seven. Justice Hagedorn wrote six, Justice Dallet wrote five, Chief Justice Ziegler and Justice

Karofsky each wrote three, and Justice Roggensack wrote two. Justice A.W. Bradley did not write a concurrence in 2022-23.

Ballot Question Case

The court's only election law decision in the 2022-23 term was a significant one.

In *Wisconsin Justice Initiative v. Wisconsin Elections Commission*,¹ the supreme court held (6-1) that the statewide ballot question concerning victims' rights, which led to a constitutional amendment in 2020, was not required to describe every essential of the proposed amendment.

The court ruled that a ballot question for a constitutional amendment complies with section XII, article 1 of the Wisconsin Constitution if it fairly describes the actual question and is not counter-factual to the amendment itself.

In dueling concurrences, Justice Dallet and Justice R. Bradley debated the role of a supreme court precedent holding that a ballot question that failed to describe "every essential" of a proposed constitutional amendment did not pass legal muster.

Dallet argued that counter-factual ballot questions were not the only ones capable of violating section XII, article 1. R. Bradley argued that the "every essential" test violated the principles of the political question doctrine and usurped the legislature.

Tyndall said that Justice Dallet's concurrence in *Wisconsin Justice Initiative v. Wisconsin Elections Commission* was more interesting to her than any of the dissents issued in the 2022-23 term.

"As pointed out by Professor Ball, the debate over the validity of 'originalism' in constitutional and statutory construction exploded in *Wisconsin Justice Initiative Inc. v. Wisconsin Elections Commission*," Tyndall said.

"Justice Dallet's concurrence asserts that methodologies for interpreting constitutions and statutes are not subject to *stare decisis*. Justices Karofsky and Ann Walsh Bradley joined that portion of Justice Dallet's concurrence. This concurrence may gain in importance next

year if incoming Justice Protasiewicz agrees with this analysis."

Products Liability Case

Another significant decision handed down in the 2022-23 term interpreted for the first time a statutory provision related to products liability law.

In *Murphy v. Columbus McKinnon Corp.*,² the supreme court held that in enacting Wis. Stat. section 895.047(1), the Wisconsin Legislature retained the consumer-contemplation test for determining whether a product is defective.

Justice Roggensack wrote the majority opinion, joined by Justice A.W. Bradley, Justice Dallet, and Justice Karofsky (except for paragraphs 38 and 41). Karofsky wrote a concurring opinion, joined by A.W. Bradley and Dallet. Justice Hagedorn wrote an opinion concurring in part and dissenting in part, joined by Chief Justice Ziegler and Justice R. Bradley.

Tyndall acknowledged that the *Murphy* decision is significant because it interpreted a recently enacted statute. But she pointed out that products liability cases are uncommon in Wisconsin.

"Court statistics show that only 38 products liability cases were filed in 2022," Tyndall said. "The court's plain-language reading of the statute accords with federal cases which had interpreted the statute and provides litigants with a clear evidentiary road map for future cases."

Insurance Cases

The court decided three important insurance cases in the 2022-23 term.

In *Dostal v. Strand*,³ the court held that a man's conviction for second-degree



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reckless homicide for causing a death in his home did not preclude indemnification under a homeowner's insurance policy.

In *Acuity v. Estate of Shimeta*,⁴ the court held that an insurance policy's reducing clause operated to reduce the "each person" limit, not the "each accident" limit, by the payments an individual received for the individual's injuries.

Tyndall said the effect of those decisions will likely be limited by their facts.

"*Acuity v. Estate of Shimeta* could have the bigger impact, because many auto insurance policies contain similar language," Tyndall said. "However, like the *Welin* case it relies on, it applies only in cases involving insureds with combined single limit policies, in which the policy has the same limit of liability per person and per accident. In my experience, cases which involve both combined single limit policies and claims exceeding the limits of the primary coverage aren't that common."

"Similarly, *Dostal* involves facts which seldom arise, concerning claims for insurance coverage where a criminal conviction has already occurred. The majority decision in *Dostal* does not appear to alter the law regarding issue preclusion."

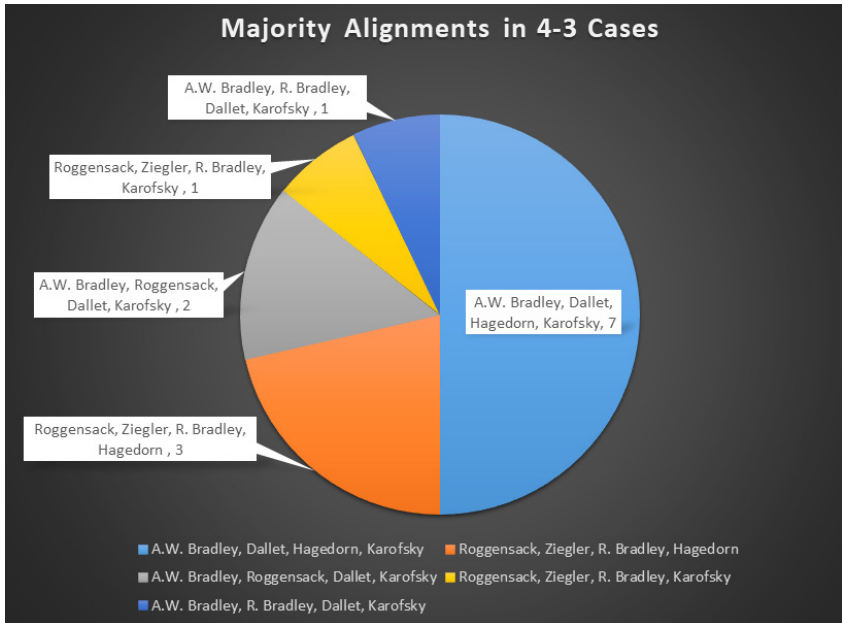
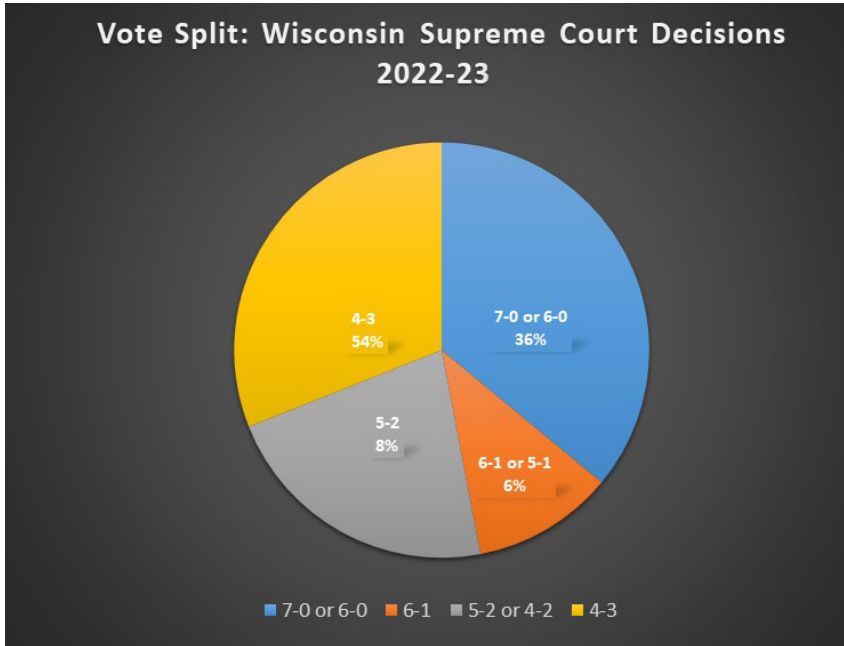
In *Secura Supreme Insurance Co. v. Estate of Huck*,⁵ the court held (6-1) that the plain wording of an insurance policy required payment of underinsured motorist benefits based on an estate's recovery after both reimbursements to the worker's compensation insurer and collection of the tortfeasor's liability payment had occurred.

Tyndall, who worked on the *Secura* case, said Justice R. Bradley's dissent was noteworthy.

"In that case, six justices applied well-settled law in concluding that an underinsured motorist's insurer could not reduce its policy limits by sums initially paid by worker's compensation, then reimbursed to the worker's compensation insurer out of the proceeds of a settlement with the tortfeasor's liability insurer," Tyndall said.

"Justice Dallet's concurrence clarifies the issue by asking: 'If I buy an \$8

Wisconsin Supreme Court Decisions & Alignments



sandwich, hand the cashier a \$10 bill, and she hands me my sandwich and \$2 in change, how much was she 'paid' for the sandwich? Eight dollars, of course. But according to *Secura*, that isn't so clear," Tyndall said. "Justice Rebecca Bradley not only agreed with the insurer – she declared the majority's decision an 'injury to the rule of law.'"

Civil Procedure Cases
 In *Fleming v. Amateur Athletic Union of the United States*,⁶ the court held that a law extending the statute of limitation for actions seeking damages for sexual assault does not apply to a claim of negligent supervision of an employee who committed sexual assault.
 In *Allsop Venture Partners III v. Murphy*

Desmond S.C.,⁷ the court held that a circuit court did not err by admitting evidence that the plaintiffs had previously settled with two other defendants in a legal malpractice case.

"*Allsop Venture Partners* seems unlikely to produce a sea change in admissibility of evidence of settlements," Tyndall said. "The trial court's decision to admit settlement evidence was discretionary and thus reviewed deferentially. Importantly, while affirming that discretionary decision, the majority decision observed that the case had 'unique facts' and reiterated that admissibility of settlement evidence is the exception, not the rule."

"Additionally, the court declared that the trial court erred in failing to hold that the defense's closing argument regarding that evidence 'crossed the line,'" Tyndall said. "Trial courts will likely continue to adhere to the statute and limit the admission of settlement evidence to avoid the opportunity for similar lines to be crossed in their courtrooms."

Medical Records Case

In the 2022-23 term, the supreme court decided a case on an issue that has spurred a spate of appellate litigation over the last decade: whether companies can charge individuals for copies of their medical records.

In *Banuelos v. University of Wisconsin Hospitals & Clinics Authority*,⁸ the supreme court held that a statute that specifies the amounts a party can charge for providing medical records is silent as to electronic records. Consequently, a party cannot charge an individual a fee for producing electronic copies of the individual's medical records.

Justice A.W. Bradley wrote the majority opinion, joined by Justice Dallet, Justice Hagedorn, and Justice Karofsky. Justice Roggensack filed a dissenting opinion. Justice R. Bradley filed a dissenting opinion, joined by Chief Justice Ziegler and Justice Roggensack.

Tyndall's firm represented Banuelos. Jesse Blocher, also a partner at Habush

Roster: The 2023-24 Wisconsin Supreme Court

Chief Justice Annette Kingsland Ziegler

- Seventeenth year on the court
- First elected in 2007
- Last elected in 2017
- Faces third election in 2027

Justice Ann Walsh Bradley

- Twenty-eighth year on the court
- First elected in 1995
- Last elected in 2015
- Faces fourth election in 2025

Justice Rebecca Bradley

- Ninth year on the court
- Appointed in 2015
- Elected in 2016
- Faces second election in 2026

Justice Rebecca Dallet

- Sixth year on the court
- First elected in 2018
- Faces second election in 2028

Justice Brian Hagedorn

- Fifth year on the court
- First elected in 2019
- Faces second election in 2029

Justice Jill Karofsky

- Fourth year on the court
- First elected in 2020
- Faces second election in 2030

Justice Janet Protasiewicz

- First year on the court
- First elected in 2023
- Faces second election in 2033 **WL**

Habush & Rottier, argued the case before the high court.

"We associate the increased litigation over the fee statute with the prevalence of out-of-state large data vendors taking over medical records copying from health care providers and increasingly pushing the envelope as to what charges are permissible to increase profitability," Blocher said.

"There have also been a number of changes in federal law and regulation over the last 15 years that influence how state law applies," Blocher said. "Our position is that the *Banuelos* decision continues the court's commonsense approach of interpreting and enforcing the statute as the legislature wrote it."

Criminal Cases

Nineteen of the 45 decisions issued by the supreme court in the 2022-23 term were in criminal law cases, with five of the 19 decided by a 4-3 vote.

Not including the decisions that were decided unanimously, the decisions in the criminal cases featured 10 different majorities, including four different four-justice majorities.

"The diverse alignments in the past term indicate that justices are carefully

and independently scrutinizing the issues presented," said Mike Tobin, a former state public defender. "Another potential factor is persuasive advocacy in framing and presenting issues effectively. Although the result of the last judicial election has been described as switching the balance of the court, the recent alignments suggest that the effect may be more subtle."

Two of the 4-3 decisions in criminal cases involved search and seizure issues: *State v. Richey*⁹ and *State v. Moore*.¹⁰

In *Richey*, the supreme court held that a police officer who stopped a motorcyclist on a Harley five minutes after another officer reported a Harley driving erratically in the same area lacked reasonable suspicion for the stop.

Justice Dallet wrote the majority opinion, joined by Justice A.W. Bradley, Justice R. Bradley, and Justice Karofsky. Justice Roggensack dissented, joined by Chief Justice Ziegler and Justice Hagedorn.

The majority reasoned that because Harley-Davidsons are common on Wisconsin roads, the general description provided to the police was an insufficient basis for the reasonable suspicion legally required for a traffic stop. The dissent argued that testimony from the

police officer that there were several motorcycles in the area on the night of the stop, plus the report of someone on a Harley-Davidson driving erratically, was sufficient basis for reasonable suspicion.

In *Moore*, the supreme court held that police officers who detected an odor of marijuana coming from a vehicle but not specifically from its driver had probable cause to arrest and search the driver.

Justice Hagedorn wrote the majority opinion, joined by Chief Justice Ziegler, Justice Roggensack, and Justice R. Bradley. Justice Dallet dissented, joined by Justice A.W. Bradley and Justice Karofsky.

In her dissent, Dallet argued that earlier Wisconsin cases holding that the odor of an illicit drug was sufficient to provide probable cause to believe that a crime had been committed should be reexamined, given the broad decriminalization or legalization of hemp products, which produce an odor similar to that of marijuana.

Access to Victims' Medical Records

One of the term's most significant decisions in a criminal case, *State v. Johnson*,¹¹ came on a 5-2 vote.

In *Johnson*, the supreme court overruled a 30-year-old Wisconsin Court of Appeals decision that granted criminal defendants the right to seek *in camera* review of a victim's medical records.

Justice Dallet wrote the majority opinion, joined by Justice Roggensack, Justice Hagedorn, Justice Karofsky, and Justice R. Bradley (¶¶ 2-22 and 25-29). Justice Karofsky and R. Bradley each wrote a concurring opinion. Justice A.W. Bradley dissented, joined by Chief Justice Ziegler.

In her opinion for the majority, Dallet concluded that the overruled decision was unsound in principle and unworkable in practice. In her dissent, A.W. Bradley argued that the majority had cast aside a criminal procedure long relied upon by litigants, without creating a replacement.

"This decision is significant as a major victory for victims' rights in the wake of the constitutional amendment expanding these rights," Tobin said. "The

Johnson court overruled the 1994 court of appeals case (*Shiffra*) that had established criteria for defense access to privately held patient records. The supreme court had previously recognized *Shiffra* as precedent on multiple occasions, as noted in the majority opinion, despite previous attempts to overrule it."

Tobin said that although the *Johnson* decision is significant, defendants already faced a high hurdle to obtaining access to the types of records at issue in the case.

"Defendants had to make a threshold showing of potential exculpatory value (necessary to a guilt [or] innocence determination) just to have the circuit court review the records *in camera*," Tobin said. "This showing was obviously difficult for a party who had not seen the records in question."

Decision on Sentence Credit

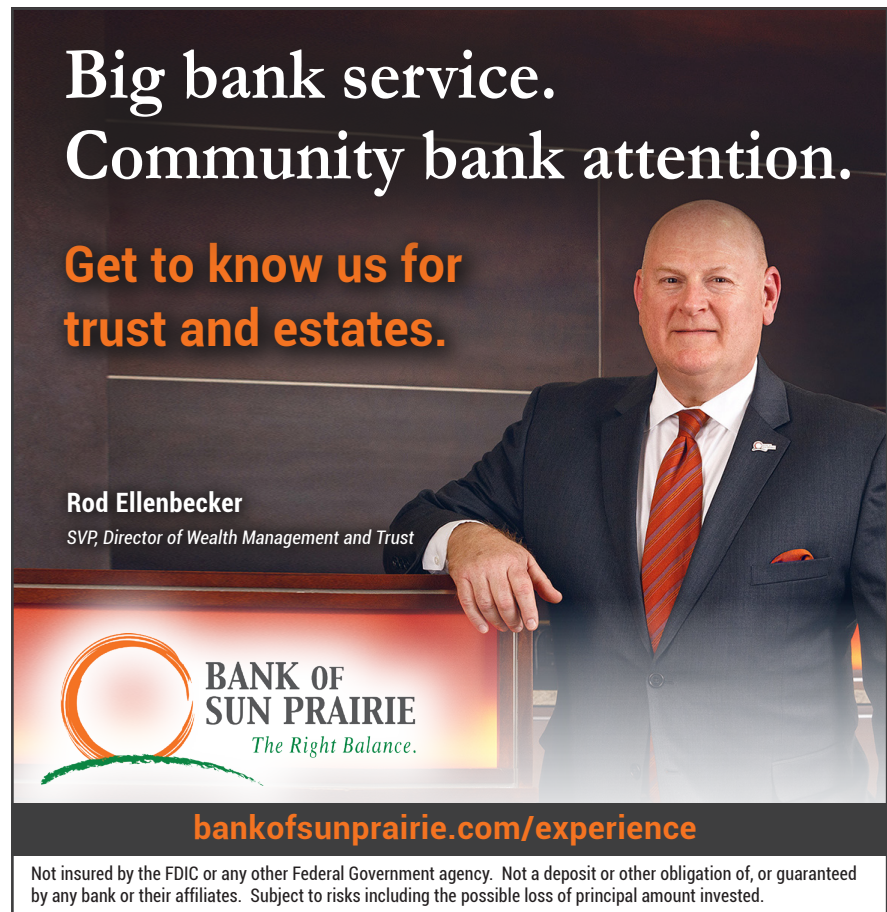
Another important decision that came on a 5-2 vote was *State v. Fermanich*.¹² In that

case, the supreme court held that a criminal defendant is entitled to a sentence credit for time served on a related charge that is dismissed but read in at sentencing.

Justice Hagedorn wrote the majority opinion, joined by Justice A.W. Bradley, Justice Roggensack, Justice Dallet, and Justice Karofsky. Justice Dallet filed a concurrence. Chief Justice Ziegler dissented, joined by Justice R. Bradley.

In his opinion for the majority, Hagedorn reasoned that supreme court precedent, *State v. Floyd*,¹³ was squarely on point. But Ziegler argued in her dissent that *Floyd* was "entirely disconnected from the statutory text"; she also argued that *Floyd* should be overruled.

"Beyond the issue of sentence credit, the opinions in *Fermanich* address broader jurisprudential issues of respect for precedent, scope of review – whether to address issues not directly raised or vigorously pursued by parties – and approaches to statutory interpretation," Tobin said.



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Wisconsin Supreme Court, Holdings and Votes – 2022-23 Term

Civil Case Decisions, 2022-23*

1. State ex rel. Kormanik v. Brash, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948 (Oct. 26, 2022)

Subject area: Appellate procedure

Holdings: Venue for an action challenging the validity of an agency rule or guidance document is determined under Wis. Stat. section 801.50(3)(b) and issuing a supervisory writ directing an appeal of that action to the proper appellate court is appropriate.

Vote: Per curiam

DALLET (concurrency)

2. Saint John's Communities Inc. v. City of Milwaukee, 2022 WI 69, 404 Wis. 2d 605, 982 N.W.2d 78 (Nov. 22, 2022)

Subject area: Taxation

Holding: A taxpayer must pay a tax before submitting a claim for recovery of the tax.

Vote: 7-0

ZIEGLER (unanimous opinion)

3. Murphy v. Columbus McKinnon Corp., 2022 WI 109, 405 Wis. 2d 157, 982 N.W.2d 898 (Dec. 28, 2022)

Subject area: Products liability

Holding: Claims for design defects governed by Wis. Stat. section 895.047(1) require proof of a safe, reasonable alternative design, proof under the consumer-contemplation standard, and compliance with the three factors set forth in the statute.

Vote: 4-3

ROGGENSACK (majority opinion), joined by A.W. BRADLEY, DALLET, and KAROFKY (except for ¶¶ 38 and 41) KAROFKY (concurring opinion), joined by A.W. BRADLEY and DALLET HAGEDORN (concurring in part and dissenting in part), joined by ZIEGLER and R. BRADLEY

4. Slabey v. Dunn County, 2023 WI 2, 405 Wis. 2d 404, 983 N.W.2d 626 (Jan. 18, 2023)

Subject area: Due process

Holding: The circuit court did not err in granting summary judgment to Dunn County on the plaintiff's 42 U.S.C. § 1983 claim against the county.

Vote: 5-2

ZIEGLER (majority opinion), joined by ROGGENSACK, R. BRADLEY, DALLET, and HAGEDORN KAROFKY (dissent), joined by A.W. BRADLEY

5. Dostal v. Strand, 2023 WI 6, 405 Wis. 2d 572, 984 N.W.2d 382 (Jan. 26, 2023)

Subject area: Civil procedure

Holding: A lawsuit over insurance coverage was not barred by issue preclusion despite the defendant's criminal conviction for reckless homicide.

Vote: 4-3

A.W. BRADLEY (majority opinion), joined by DALLET, HAGEDORN, and KAROFKY

ZIEGLER (dissent), joined by ROGGENSACK and R. BRADLEY

6. Lowe's Home Centers LLC v. City of Delavan, 2023 WI 8, 405 Wis. 2d 616, 985 N.W.2d 69 (Feb. 16, 2023)

Subject area: Taxation

Holdings: Property tax assessments were properly afforded a statutory presumption of correctness, and the plaintiff did not present significant contrary evidence sufficient to overcome the presumption of correctness.

Vote: 7-0

A.W. BRADLEY (majority opinion), joined by ZIEGLER, ROGGENSACK, DALLET, HAGEDORN, and KAROFKY R. BRADLEY (concurrency), joined by ROGGENSACK

7. Citation Partners LLC v. Wisconsin Department of Revenue, 2023 WI 16, 406 Wis. 2d 36, 985 N.W.2d 761 (March 1, 2023)

Subject area: Taxation

Holding: Engine maintenance and repair costs that an aircraft's owner included in the hourly rates charged to aircraft lessees are subject to sales tax and do not fall within a tax exemption for aircraft parts and maintenance.

Vote: 4-3

DALLET (majority opinion), joined by A.W. BRADLEY, HAGEDORN, and KAROFKY ROGGENSACK (dissent), joined by ZIEGLER and R. BRADLEY

8. In re Atrium of Racine Inc., 2023 WI 19, 406 Wis. 2d 247, 986 N.W.2d 780 (March 16, 2023)

Subject area: Bankruptcy

Holdings: 1) Under Wis. Stat. section 128.17, the bondholders' mortgage lien is superior to the contract claims of residents of a senior-living facility. 2) The bondholders did not contract away the superiority of their claims. 3) The *Episcopal Homes* decision does not apply to this case.

Vote: 7-0

R. BRADLEY (unanimous opinion)

9. Milwaukee Police Supervisors Organization v. City of Milwaukee, 2023 WI 20, 406 Wis. 2d 279, 986 N.W.2d 801 (March 21, 2023)

Subject area: Employment law

Holding: The plain wording of the Milwaukee City Charter requires the City of Milwaukee Employees' Retirement System to include "pension offset payments" in the calculation of firefighters' duty disability retirement benefits.

Vote: 7-0

R. BRADLEY (unanimous opinion)

10. Secura Supreme Insurance Co. v. Estate of Huck, 2023 WI 21, 406 Wis. 2d 297, 986 N.W.2d 810 (March 22, 2023)

Subject area: Insurance

Holding: The plain wording of an insurance policy required payment of underinsured motorist benefits based on an estate's recovery after both reimbursements to the worker's compensation insurer and collection of the tortfeasor's liability payment had occurred.

Vote: 6-1

ROGGENSACK (majority opinion), joined by ZIEGLER, A.W. BRADLEY, DALLET, HAGEDORN, and KAROFKY (with respect to ¶¶ 1-2, 4-16, and 29), and an opinion, joined by ZIEGLER DALLET (concurrency), joined by A.W. BRADLEY, HAGEDORN, and KAROFKY R. BRADLEY (dissent)

11. Pagoudis v. Keidl, 2023 WI 27, 406 Wis. 2d 542, 988 N.W.2d 606 (April 4, 2023)

Subject area: Civil procedure

Holding: In a suit over alleged misrepresentations involving residential real estate, only one of three "legally distinct entities" stated a valid claim.

Vote: 5-2

KAROFKY (majority opinion), joined by ZIEGLER, A.W. BRADLEY, DALLET, and HAGEDORN ZIEGLER (concurrency), joined by HAGEDORN

ROGGENSACK (concurring in part and dissenting in part)

R. BRADLEY (concurring in part and dissenting in part)

12. Banuelos v. University of Wisconsin Hospitals & Clinics Authority, 2023 WI 25, 406 Wis. 2d 439, 988 N.W.2d 627 (April 5, 2023)

Subject area: Medical records

Holding: Wis. Stat. section 146.83(3f) does not allow health-care providers to charge fees for electronic records.

Vote: 4-3

A.W. BRADLEY (majority opinion), joined by DALLET, HAGEDORN, and KAROFKY ROGGENSACK (dissent)
R. BRADLEY (dissent), joined by ZIEGLER and ROGGENSACK

13. *Acuity v. Estate of Shimeta*, 2023 WI 28, 406 Wis. 2d 730, 987 N.W.2d 689 (April 7, 2023)

Subject area: Underinsured motorist coverage

Holding: An insurance policy's reducing clause operated to reduce the "each person" limit, not the "each accident" limit, by the payments an individual received for the individual's injuries.

Vote: 4-3

KAROFKY (majority opinion), joined by A.W. BRADLEY, ROGGENSACK, and DALLET
ZIEGLER (dissent), joined by R. BRADLEY
HAGEDORN (dissent), joined by R. BRADLEY

14. *DEKK Property Management LLC v. Wisconsin Department of Transportation*, 2023 WI 30, 406 Wis. 2d 768, 988 N.W.2d 653 (April 18, 2023)

Subject area: Real property

Holding: Actions to recover damages under Wis. Stat. section 32.05(5) are limited to issues pertaining to the condemnation of the property described in the jurisdictional offer.

Vote: 7-0

KAROFKY (majority opinion), joined by ZIEGLER, A.W. BRADLEY, ROGGENSACK, DALLET, and HAGEDORN
R. BRADLEY (concurrency)

15. *Green Bay Professional Police Ass'n v. City of Green Bay*, 2023 WI 33, 407 Wis. 2d 11, 988 N.W.2d 664 (April 27, 2023)

Subject area: Arbitration

Holding: An arbitrator did not manifestly disregard the law when he determined that the process afforded to the plaintiff (a police officer) in a disciplinary proceeding was constitutionally adequate.

Vote: 7-0

KAROFKY (majority opinion), joined by ZIEGLER, A.W. BRADLEY, ROGGENSACK, DALLET, and HAGEDORN
ZIEGLER (concurrency)
R. BRADLEY (concurrency)

16. *Gahl v. Aurora Health Care Inc.*, 2023 WI 35, ___ Wis. 2d ___, 989 N.W.2d 561 (May 2, 2023)

Subject area: Health care

Holding: The circuit court erroneously granted an injunction that compelled a health-care provider to administer ivermectin to a patient over the provider's objection.

Vote: 6-1

A.W. BRADLEY (majority opinion), joined by ZIEGLER, ROGGENSACK, DALLET, HAGEDORN, and KAROFKY
R. BRADLEY (dissent)

17. *Wisconsin Justice Initiative Inc. v. Wisconsin Elections Commission*, 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122 (May 16, 2023)

Subject area: Constitutional law

Holding: A ballot question for a constitutional amendment complies with section XII, article 1 of the Wisconsin Constitution if it fairly describes the actual question and is not counterfactual to the amendment itself.

Vote: 6-1

HAGEDORN (majority opinion), joined by ZIEGLER, ROGGENSACK, and R. BRADLEY, and DALLET and KAROFKY (with respect to ¶¶ 58-59 and ¶¶ 61-65)
R. BRADLEY (concurrency), joined by ZIEGLER and ROGGENSACK
DALLET (concurrency), joined by KAROFKY, and A.W. BRADLEY (with respect to ¶¶ 93-122)
HAGEDORN (concurrency), joined by DALLET (with respect to ¶¶ 137-150)
A.W. BRADLEY (dissent)

18. *Fleming v. Amateur Athletic Union of United States Inc.*, 2023 WI 40, 407 Wis. 2d 273, 990 N.W.2d 244 (May 17, 2023)

Subject area: Civil procedure

Holding: A law that extends the statute of limitation for actions seeking redress for injuries caused by sexual assault does not apply to a claim of negligent supervision of an employee who committed sexual assault.

Vote: 4-3

ZIEGLER (majority), joined by ROGGENSACK, R. BRADLEY, and HAGEDORN
KAROFKY (dissent), joined by A.W. BRADLEY and DALLET

19. *Allsop Venture Partners III v. Murphy Desmond SC*, 2023 WI 43, 407 Wis. 2d 387, 991 N.W.2d 320 (June 2, 2023)

Subject area: Evidence

Holding: A circuit court did not err by admitting evidence that the plaintiffs had previously settled with two other defendants in a legal malpractice case.

Vote: 4-3

HAGEDORN (majority), joined by A.W. BRADLEY, DALLET, and KAROFKY
ZIEGLER (dissent), joined by ROGGENSACK and R. BRADLEY

20. *Miller v. Zoning Board of Appeals*, 2023 WI 46, 407 Wis. 2d 678, 991 N.W.2d 380 (June 6, 2023)

Subject area: Zoning

Holding: A person opposing an application for rezoning has no right to an impartial decision-maker.

Vote: 7-0

DALLET (unanimous opinion)

21. *5 Walworth LLC v. Engerman Contracting Inc.*, 2023 WI 51, 408 Wis. 2d 39, 992 N.W.2d 31 (June 20, 2023)

Subject area: Insurance

Holding: Answering whether an accident caused damage to another's property is not appropriate in determining whether the damage is covered by a commercial general liability insurance policy.

Vote: 5-2

HAGEDORN (majority), joined by A.W. BRADLEY, DALLET, and KAROFKY, and ZIEGLER (except for ¶¶ 5, 7, 39-42, and 49)
ROGGENSACK (concurrency)
ZIEGLER (concurring in part, dissenting in part), joined by R. BRADLEY

22. *Greenwald Family Limited Partnership v. Village of Mukwonago*, 2023 WI 53, 408 Wis. 2d 143, 991 N.W.2d 356 (June 21, 2023)

Subject area: Civil procedure

Holding: A property owner seeking to appeal a special assessment failed to properly serve a notice of appeal on the village because the property owner failed to serve the village clerk.

Vote: 4-3

A.W. BRADLEY (majority), joined by DALLET, HAGEDORN, and KAROFKY
ZIEGLER (dissent), joined by ROGGENSACK and R. BRADLEY

23. *Wisconsin Property Taxpayers Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100 (June 29, 2023)

Subject area: Municipal taxation

Holding: A transportation utility fee charged to property owners by a town is a property tax subject to the state's

CONTINUED

Holdings and Votes - 2022-23 Term (continued)

municipal levy limit.

Vote: 7-0

R. BRADLEY (unanimous opinion)

R. BRADLEY (concurring opinion), joined by ROGGENSACK

24. *Walworth County v. M.R.M. (In re Mental Commitment of M.R.M.)*, 2023 WI 59, 408 Wis. 2d 316, 992 N.W.2d 809 (June 29, 2023)

Subject area: Civil commitment

Holding: A 2022 decision that held a request for a jury trial in a commitment proceeding is timely if made at least 48 hours before the date of the actual, rather than the scheduled, proceeding applies retroactively.

Vote: 5-2

DALLET (majority opinion), joined by A.W. BRADLEY, HAGEDORN, and KAROFISKY

R. BRADLEY (concurring opinion)

ROGGENSACK (dissent)

ZIEGLER (dissent)

25. *State v. A.G. (In re Termination of Parental Rts. to A.G.)*, 2023 WI 61, 408 Wis. 2d 413, 992 N.W.2d 75 (June 30, 2023)

Subject area: Termination of parental rights

Holding: A circuit court told a defendant the wrong evidentiary standard it would use in deciding whether to terminate the defendant's parental rights, but this error was not grounds for allowing the defendant to withdraw his no-contest plea.

Vote: 4-2

R. BRADLEY (mandate), joined by ZIEGLER

HAGEDORN (conurrence), joined by KAROFISKY

DALLET (dissent), joined by A.W. BRADLEY

ROGGENSACK did not participate.

26. *Sanders v. State Claims Board*, 2023 WI 60 (June 30, 2023)

Subject area: Compensation for wrongful conviction

Holding: Wis Stat. section 775.05(4) does not require the State Claims Board to submit a report to the Wisconsin Legislature if the board makes no finding that the maximum award of \$25,000 to a wrongfully imprisoned claimant is inadequate.

Vote: 4-3

R. BRADLEY (majority), joined by ZIEGLER and ROGGENSACK

HAGEDORN (conurrence)

KAROFISKY (dissent), joined by A.W. BRADLEY and DALLET

Criminal Case Decisions, 2022-23

1. *State v. Moeser*, 2022 WI 76, 405 Wis. 2d 1, 982 N.W.2d 45 (Nov. 23, 2022)

Subject area: Search and seizure

Holding: An affidavit for a search warrant satisfies the constitutional-oath-or-affirmation requirement as long as the affiant executed the affidavit in a form calculated to awaken the affiant's conscience and duty to tell the truth.

Vote: 5-2

ZIEGLER (majority opinion), joined by ROGGENSACK, R. BRADLEY, HAGEDORN, and KAROFISKY

HAGEDORN (conurrence), joined by KAROFISKY

A.W. BRADLEY (dissent), joined by DALLET

2. *State v. Wilson*, 2022 WI 77, 404 Wis. 2d 623, 982 N.W.2d 67 (Nov. 23, 2022)

Subject area: Search and seizure

Holding: To conduct a valid "knock and talk" investigation, police officers must have an implicit license to enter an individual's property.

Vote: 7-0

A.W. BRADLEY (unanimous opinion)

3. *State v. Richey*, 2022 WI 106, 405 Wis. 2d 132, 983 N.W.2d 617 (Dec. 9, 2022)

Subject area: Search and seizure

Holding: A police officer lacked particularized reasonable suspicion when she stopped a motorcyclist on the basis that he was driving near where a person on the same make of motorcycle had been seen driving erratically five minutes earlier.

Vote: 4-3

DALLET (majority opinion), joined by A.W. BRADLEY, R. BRADLEY, and KAROFISKY

ROGGENSACK (dissent), joined by ZIEGLER and HAGEDORN

4. *State v. Hineman*, 2023 WI 1, 405 Wis. 2d 233, 983 N.W.2d 652 (Jan. 10, 2023)

Subject area: Due process

Holdings: The state did not violate the defendant's due-process rights by failing to disclose exculpatory evidence, and the defendant was not denied the right to effective assistance of counsel.

Vote: 7-0

ZIEGLER (unanimous opinion)

KAROFISKY (conurrence), joined by R. BRADLEY

5. *State v. Jackson*, 2023 WI 3, 405 Wis. 2d 458, 983 N.W.2d 608 (Jan. 20, 2023)

Subject area: Ineffective assistance of counsel

Holding: The circuit court erred by failing to hold a *Machner* hearing on one of the defendant's three claims of ineffective assistance of counsel.

Vote: 6-0

DALLET (unanimous opinion)

ROGGENSACK did not participate.

6. *State v. Thomas*, 2023 WI 9, 405 Wis. 2d 654, 985 N.W.2d 87 (Feb. 21, 2023)

Subject area: Confrontation Clause

Holding: Sufficient evidence corroborated the defendant's confession, and the state's use of an inadmissible report from an expert was harmless error.

Vote: 7-0

ROGGENSACK announced the court's mandate and delivered an opinion, joined by ZIEGLER, C.J.

ROGGENSACK (majority opinion) (with respect to ¶¶ 2 and 12-24), joined by A.W. BRADLEY, R.G. BRADLEY, DALLET, and KAROFISKY, and HAGEDORN (with respect to ¶¶ 12-24)

DALLET (concurring opinion), which constitutes the court's majority opinion, joined by A.W. BRADLEY, R.G. BRADLEY, and KAROFISKY

HAGEDORN (concurring opinion)

7. *State v. Nietzold*, 2023 WI 22, 406 Wis. 2d 349, 986 N.W.2d 795 (March 28, 2023)

Subject area: Plea bargains

Holding: A prosecutor made a substantial and material breach of a plea agreement but successfully cured the breach.

Vote: 7-0

HAGEDORN (unanimous opinion)

8. *State v. Hoyle*, 2023 WI 24, 406 Wis. 2d 373, 987 N.W.2d 732 (March 31, 2023)

Subject area: Fifth Amendment self-incrimination

Holding: When the defendant decided not to testify at trial, a prosecutor's comment in closing that the evidence was "uncontroverted" did not violate the defendant's Fifth Amendment right not to testify.

Vote: 5-2

ZIEGLER (majority opinion), joined by ROGGENSACK, R. BRADLEY, HAGEDORN, and KAROFISKY

HAGEDORN (conurrence), joined by R. BRADLEY

DALLET (dissent), joined by A.W. BRADLEY

9. State v. Mull, 2023 WI 26, 406 Wis. 2d 491, 987 N.W.2d 707 (April 4, 2023)

Subject area: Ineffective assistance of counsel

Holding: The defendant was not deprived of effective assistance of counsel.

Vote: 6-1

ROGGENSACK (majority opinion), joined by ZIEGLER, A.W. BRADLEY, R. BRADLEY, HAGEDORN, and KAROFISKY DALLET (dissent)

10. State v. Johnson, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174 (May 16, 2023)

Subject area: Physician-patient privilege

Holding: The court overruled a Wisconsin Court of Appeals decision issued in 1993 that granted criminal defendants the right to seek in camera review of a victim's medical records because the 1993 decision is unsound in principle and unworkable in practice.

Vote: 5-2

DALLET (majority opinion), joined by ROGGENSACK, HAGEDORN, and KAROFISKY, and R. BRADLEY (with respect to ¶¶ 2-22 and 25-29) R. BRADLEY (concurrency) KAROFISKY (concurrency) A.W. BRADLEY (dissent), joined by ZIEGLER

11. State v. Rector, 2023 WI 41, 407 Wis. 2d 321, 990 N.W.2d 213 (May 23, 2023)

Subject area: Sex-offender-registration requirements

Holding: A statute that requires repeat sex offenders to comply with sex-offender-registration requirements for life does not apply to an offender convicted of multiple convictions in the same court proceeding.

Vote: 4-3

KAROFISKY (majority opinion), joined by A.W. BRADLEY, DALLET, and HAGEDORN R. BRADLEY (concurring in part and dissenting in part), joined by ZIEGLER and ROGGENSACK

12. State v. Anderson, 2023 WI 44, 407 Wis. 2d 428, 990 N.W.2d 771 (June 2, 2023)

Subject area: Competency to stand trial

Holding: Because the state conceded that it failed to meet the applicable legal test, the court of appeals' decision

affirming the circuit court's order to involuntarily administer medication to a criminal defendant is reversed.

Vote: Per curiam

ROGGENSACK (dissent)

13. State v. Barnes, 2023 WI 45, 407 Wis. 2d 652, 990 N.W.2d 759 (June 6, 2023)

Subject area: Confrontation Clause

Holding: The admission of hearsay evidence that the defendant had participated in a drug buy was harmless error given the overwhelming quantity of the rest of the state's evidence.

Vote: 7-0

R. BRADLEY (unanimous) ZIEGLER (concurrency), joined by ROGGENSACK

14. State v. Fermanich, 2023 WI 48, 407 Wis. 2d 693, 991 N.W.2d 340 (June 14, 2023)

Subject area: Sentencing

Holding: A criminal defendant is entitled to a sentence credit for time served on a related charge that is dismissed but read in at sentencing.

Vote: 5-2

HAGEDORN (majority), joined by A.W. BRADLEY, ROGGENSACK, DALLET, and KAROFISKY DALLET (concurrency) ZIEGLER (dissent), joined by R. BRADLEY

15. State v. Williams-Holmes, 2023 WI 49, 408 Wis. 2d 1, 991 N.W.2d 373 (June 20, 2023)

Subject area: Probation

Holding: A circuit court must clarify whether an order imposing a probation condition is consistent with state law that authorizes a circuit court to modify such a condition.

Vote: 4-3

HAGEDORN (majority), joined by A.W. BRADLEY, DALLET, and KAROFISKY ZIEGLER (dissent), joined by ROGGENSACK and R. BRADLEY

16. State v. Moore, 2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412 (June 20, 2023)

Subject area: Search and seizure

Holding: Police officers who detected an odor of marijuana coming from a vehicle but not its driver had probable cause to arrest and search the driver.

Vote: 4-3

HAGEDORN (majority), joined by ZIEGLER, ROGGENSACK, and R.

BRADLEY

DALLET (dissent), joined by A.W. BRADLEY and KAROFISKY

17. State v. Killian, 2023 WI 52, 408 Wis. 2d 92, 991 N.W.2d 387 (June 21, 2023)

Subject area: Double jeopardy

Holding: A second prosecution for alleged acts that were the subject of a previous trial that ended in a mistrial did not place a defendant in double jeopardy because several charges in the second prosecution involved different elements.

Vote: 5-2

ZIEGLER (majority), joined by ROGGENSACK, DALLET, HAGEDORN, and KAROFISKY A.W. BRADLEY (dissent), joined by R. BRADLEY

18. State v. Debrow, 2023 WI 54, 408 Wis. 2d 178, 992 N.W.2d 114 (June 23, 2023)

Subject area: Evidence

Holding: A circuit court did not err by denying a motion for a mistrial when, after a ruling that a defendant's prior conviction was inadmissible, a witness stated that he'd "looked at CCAP."

Vote: 7-0

KAROFISKY (majority), joined by ZIEGLER, A.W. BRADLEY, DALLET, and HAGEDORN ROGGENSACK (concurrency), joined by R. BRADLEY

19. State v. Green, 2023 WI 57, 408 Wis. 2d 248, 992 N.W.2d 56 (June 29, 2023)

Subject area: Double jeopardy

Holding: A circuit court did not err by declaring a mistrial when defense counsel introduced third-party perpetrator evidence without first notifying the state.

Vote: 4-3

R. BRADLEY (majority), joined by ZIEGLER, ROGGENSACK, and KAROFISKY A.W. BRADLEY (dissent), joined by DALLET HAGEDORN (dissent)

*Most of the holdings displayed in the table were summarized by Marquette University Law School Professors Daniel D. Blinka and Thomas J. Hammer and were originally published in the Supreme Court Digest that appears in *Wisconsin Lawyer*™.

Two Double Jeopardy Decisions

The supreme court decided two cases involving double jeopardy issues in the 2022-23 term, both on 5-2 votes: *State v. Killian*¹⁴ and *State v. Green*.¹⁵

In *Killian*, the supreme court held that a second prosecution for alleged acts that were the subject of a previous trial that ended in a mistrial did not place the defendant in double jeopardy because several charges in the second prosecution involved different elements.

Chief Justice Ziegler wrote the majority opinion, joined by Justice Roggensack, Justice Dallet, Justice Hagedorn, and Justice Karofsky. Justice A.W. Bradley dissented, joined by Justice R. Bradley.

In her dissent, A.W. Bradley argued that the prosecutor violated a pre-trial order in the first trial because he intended all along to file additional charges for alleged acts committed against the same victims. She acknowledged that those additional alleged acts were different from the acts alleged in the first trial but argued that the court should consider the entire record from the first trial when determining whether a second trial would violate *Killian's* right against double jeopardy.

In *Green*, the supreme court held that

the circuit court did not err by declaring a mistrial when defense counsel introduced third-party perpetrator evidence without first notifying the state.

"*Green* seemingly prioritizes local court practices and judicial discretion over the defendant's protection against double jeopardy," Tobin said. "The trial court declared a mistrial after a defense witness in this sex trafficking case had testified that he, rather than the defendant, had driven the victim to a hotel. The witness had been listed on the defense witness list, and the prosecution did not object to the testimony."

"Although the witness's testimony unquestionably raised a debatable evidentiary issue mid-trial, such a circumstance can arise in any trial, even when both parties have pursued pretrial discovery and motion practice more completely than occurred in *Green*," Tobin said. "Future cases may shed more light on whether the court can find manifest necessity for a mistrial when such issues arise, rather than pausing the trial to consider both the admissibility of the evidence and possible alternatives to mistrial, if the jury has heard inadmissible evidence."

Self-incrimination Decision

The supreme court also issued an opinion (4-3) addressing the right against self-incrimination. In *State v. Hoyle*,¹⁶ the supreme court held that a prosecutor who repeatedly used the term "uncontroverted" to refer to evidence in a case in which the defendant neither testified nor presented any witnesses did not violate the defendant's Fifth Amendment right against self-incrimination.

Chief Justice Ziegler wrote the majority opinion, joined by Justice Roggensack, Justice R. Bradley, Justice Hagedorn, and Justice Karofsky. Justice Hagedorn wrote a concurring opinion, which Justice R. Bradley joined. Justice Dallet dissented, joined by Justice A.W. Bradley.

In his concurrence, Hagedorn argued that the dissent had engaged in a "choose-your-own-adventure judicial methodology." In her dissent, Dallet argued that the "concurrence simply assumes that, because the Fifth Amendment was adopted in a radically different context than today, contemporary courts must stand silent when prosecutors use a defendant's decision not to testify against him."

"Overall, the *Hoyle* opinions feature not only analysis of the specific legal issues, but also broad discussion of methodologies for constitutional interpretation, with discussion of whether the opinions reflected judicial restraint or judicial activism," Tobin said. **WL**

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STATE BAR OF WISCONSIN

ENDNOTES

- ¹2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122.
- ²2022 WI 109, 405 Wis. 2d 157, 982 N.W.2d 898.
- ³2023 WI 6, 405 Wis. 2d 572, 984 N.W.2d 382.
- ⁴2023 WI 28, 406 Wis. 2d 730, 987 N.W.2d 689.
- ⁵2023 WI 21, 406 Wis. 2d 297, 986 N.W.2d 810.
- ⁶2023 WI 40, 407 Wis. 2d 273, 990 N.W.2d 244.
- ⁷2023 WI 43, 407 Wis. 2d 387, 991 N.W.2d 320.
- ⁸2023 WI 25, 406 Wis. 2d 439, 988 N.W.2d 627.
- ⁹2022 WI 106, 405 Wis. 2d 132, 983 N.W.2d 617.
- ¹⁰2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412.
- ¹¹2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174.
- ¹²2023 WI 48, 407 Wis. 2d 693, 991 N.W.2d 340.
- ¹³2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155.
- ¹⁴2023 WI 52, 408 Wis. 2d 92, 991 N.W.2d 387.
- ¹⁵2023 WI 57, 408 Wis. 2d 248, 992 N.W.2d 56.
- ¹⁶2023 WI 24, 406 Wis. 2d 373, 987 N.W.2d 732.

WL